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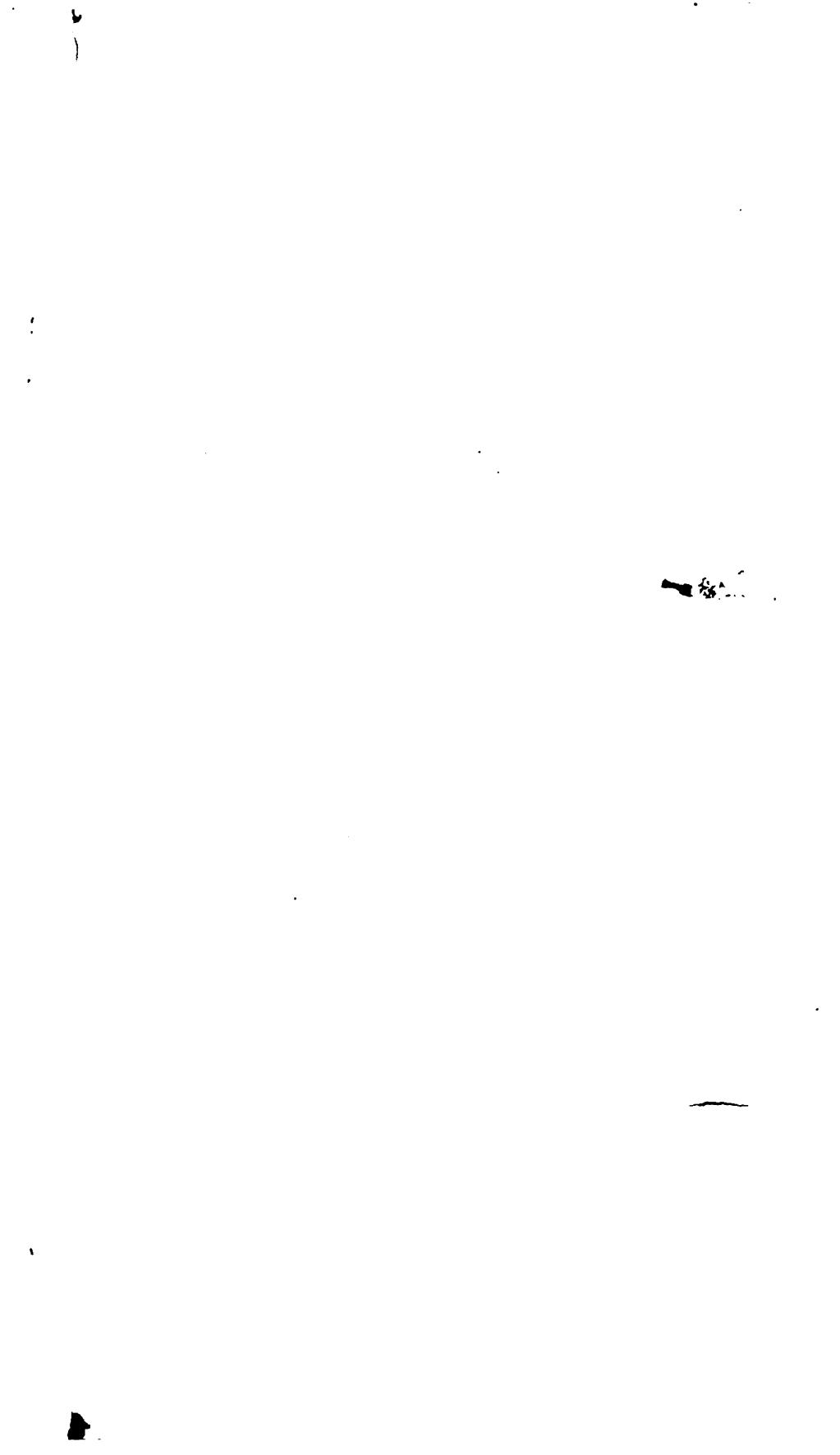
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Jan 13

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57

# REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

# COURT OF COMMON PLEAS

FOR THE

*Vol.*

CITY AND COUNTY OF NEW YORK.

---

BY HENRY HILTON,  
ONE OF THE JUDGES OF THE COURT.

---

VOLUME I.

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KFN  
5052  
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1855

NEW YORK:

BANKS & BROTHERS, LAW PUBLISHERS,  
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1859.

Entered according to act of Congress, in the year one thousand eight hundred and fifty-nine,

By BANKS & BROTHERS,

In the clerk's office of the district court of the southern district of New York.

Fee Nov 13, 1860

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## REPORTER'S NOTE.

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IN the preparation of these reports, much care has been taken to exclude all matter not considered essential to a complete understanding of the questions presented to the court for ~~decision~~. The effect of adopting this course has been to enable the reporter to present an unusual number of cases in a single volume.

With the exception of two cases at the close of the volume, and in which no appeal was taken, the decisions were made at General Term, held by all the Judges at the time composing the court.

In 1855, those Judges were INGRAHAM, DALY, and WOODRUFF. In 1856 and 1857, INGRAHAM, DALY, and BRADY; and in 1858, DALY, BRADY, and HILTON.

NEW YORK, October, 1859.

JUDGES  
OF THE  
COURT OF COMMON PLEAS  
FOR THE  
CITY AND COUNTY OF NEW YORK,  
SINCE ITS RE-ORGANIZATION IN 1821,  
WITH THE YEARS IN WHICH THEIR OFFICIAL TERMS ORIGINALLY  
COMMENCED.

---

JOHN T. IRVING, . . . . .	1821
MICHAEL ULSHOEFFER, . . .	1834
DANIEL P. INGRAHAM, . . .	1838
WILLIAM INGLIS, . . . . .	1839
CHARLES P. DALY, . . . . .	1844
LEWIS B. WOODRUFF, . . .	1850
JOHN R. BRADY, . . . . .	1856
HENRY HILTON, . . . . .	1858

---

**Judges during the Period embraced in these Reports.**

DANIEL P. INGRAHAM,  
CHARLES P. DALY,  
LEWIS B. WOODRUFF,  
JOHN R. BRADY,  
HENRY HILTON.

---

The General Term cases in this volume are reported in their order, beginning in December, 1855, and ending in April, 1858.

JUDGE INGRAHAM occupied the position of First Judge until January, 1858, when he was succeeded by JUDGE DALY.

JUDGE WOODRUFF was elected to the SUPERIOR COURT, and JUDGE INGRAHAM to the SUPREME COURT. The place of the former was filled by JUDGE BRADY, and of the latter by JUDGE HILTON.

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# CASES

ARGUED AND DETERMINED,

IN THE

## COURT OF COMMON PLEAS

FOR THE

CITY AND COUNTY OF NEW YORK.

---

**EDWARD R. WORTH v. BENJAMIN A. MUMFORD, and others.**

**JOSEPH C. BEALS v. THE SAME.**

**REUBEN S. THOMPSON v. THE SAME.**

**NICHOLAS L. BURBANK v. THE SAME.**

**CHARLES T. STEWART v. THE SAME.**

**DAVIS HALL v. THE SAME.**

**ALONZO M. GRAY v. THE SAME.**

**GEORGE COLEMAN v. THE SAME.**

The rule by which seamen lose their wages by the loss of the vessel is one of public policy, founded upon the assumption that such a rule is essential to stimulate them to use every exertion for the safety of the ship, but it applies only in cases where there is a total loss of vessel and cargo.

Where there is not a total loss, the seamen's contract continues in force as long as anything is essential to be done in the rescue and preservation of whatever can be saved of the vessel or cargo, and up to the time that the seamen are engaged in the discharge of that duty they are entitled to wages, if they have faithfully performed their duty. When, however, by capture or perils of the sea, the vessel and cargo are totally lost, their contract is at an end and the rule of public policy applies.

The right to wages does not grow out of or depend upon the earning of freight. It has its foundation in the seaman's contract and the faithful performance of it on

## Worth v. Mumford.

his part, and the maxim that "*freight is the mother of wages*," in the view that they depend upon the earning of freight, is erroneous. *Per Daly, J.*  
The origin of this maxim and the erroneous views to which it has given rise, together with the history, the reasons for and nature of the maritime policy by which the interest of the seamen is connected with the safety of the ship, commented upon and discussed. *Per Daly, J.*

A seaman, as long as his contract continues in force, cannot act in the capacity of a salvor or become entitled to compensation as such, but is bound by his contract to exert himself to the utmost to save and preserve whatever can be rescued from the wreck. *Per Daly, J.*

In addition to the personal liability of the master and owner under the contract, the seaman has, by way of security, a lien upon the vessel as long as a fragment of it remains, and upon the freight, if any is earned before or after the breaking up of the voyage. *Per Daly, J.*

The seamen's right to wages does not depend upon whether sufficient is saved from ~~the~~ wreck to pay them, or upon whether freight enough has been earned or may be earned for that purpose. The seamen's lien upon the vessel and freight is a security collateral to the principal contract, which is not created by the act of shipwreck, but which existed from the beginning and which is never wholly extinguished as long as a fragment of the vessel remains or there is a probability of freight being earned upon any part of the cargo saved. *Per Daly, J.*

A vessel bound from Callao to Baltimore, after having encountered severe gales, was brought, by great exertion on the part of the seamen, into the harbor of Pernambuco, by which the cargo was secured in safety though the vessel had to be abandoned as a wreck.

*Held*, That the seamen were entitled to their wages up to the time when their labor ceased in the landing, securing and preservation of the cargo.

The cargo having been shipped by another vessel to Baltimore, by which the owners of the abandoned vessel became entitled to freight, *held*, that freight had been earned, if the earning of it was essential to entitle the seamen to their wages, though the cost of transporting the cargo from Pernambuco to the port of delivery amounted to a greater sum than the owners of the wrecked vessel were to receive if the original voyage had been completed.

A receipt by the seaman of his share of the proceeds from the sale of the vessel is not conclusive upon his claim for the balance of his wages, especially where it is signed under a threat from the consul that he should get nothing unless he signed it. Even if the receipt had been in full, it would not, under such circumstances, be conclusive against the seaman.

An entry in the log-book is, by the act of 1790, evidence of desertion, and if there is no other it is conclusive, but to make it so the statute must be strictly complied with, and it must appear to have been entered on the day when the seaman left, and from the entry that he left without leave.

Parol evidence is admissible to contradict the entry, and when the entry was shown to have been interpolated after the alleged day of desertion, and there was evi-

## Worth v. Mumford.

dence that the seamen did not leave the vessel, a finding of the fact contrary to the log-book was sustained.

An entry in the log-book is not evidence *per se*, unless where the statute makes it so. It cannot, therefore, be received to show a general maritime desertion.

A general maritime desertion may be shown against the claim for wages, though no entry of the fact has been made in the log-book. It is otherwise, however, when the owner relies upon a forfeiture, under the act of 1790, of a day's wages for every hour that the seaman are absent without leave.

THESE actions were brought in the Marine Court to recover the wages of the plaintiffs as seamen on board the ship Palestine, on a voyage from San Francisco, bound for a port in the Atlantic states.

The defendants denied the indebtedness and alleged payment, desertion, breach of contract on the part of the plaintiffs, and that the vessel earned no freight.

In the suit of Beals it was set up as an additional defence that the vessel was condemned and sold in a foreign port and proceeds distributed, he receiving his proportion of the proceeds in settlement and satisfaction of his demand.

The amount claimed in each case was \$487.50, and the facts appearing at the trial were, that the plaintiffs respectively shipped as mariners on the ship for a voyage from San Francisco to one or more ports in Peru, at a stipulated rate of wages, and from thence to a port of discharge in the United States, at the "going rate of wages." The ship proceeded to Callao and from thence to the Chincha Islands in ballast, where she took in a cargo of guano, after which she returned to Callao, and from thence proceeded on her voyage to Baltimore. After rounding the Cape she encountered heavy gales in the Atlantic, during which she sprung a leak, leaking at the rate of fifteen hundred strokes an hour, and after incessant labor at the pumps for fourteen days the ship and cargo were brought in safety into the harbor of Pernambuco. Upon the arrival of the ship at that port she was found to be in so disabled a state that a survey was ordered, and the surveyors certified that she was in an unsafe condition to proceed on her voyage, and they recommended that her cargo be discharged as expeditiously as possible. Her cargo

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was accordingly discharged, after which another survey was ordered, and the surveyors certified that it would cost more to put her in repair than the value of the ship, and they recommended that she be sold at public auction to the highest bidder, for the benefit of all concerned. The vessel was accordingly sold and the cargo was shipped by another vessel to Baltimore, at a cost of \$13.88 a ton, that being the lowest rate at which its transportation could be obtained from Pernambuco to Baltimore, and which was \$1.83 more per ton than the rate at which the owners had agreed to carry it from the Chincha Islands to Baltimore; that is, it cost the owners more to complete the contract than they were to receive from the freighter at the Chincha Islands.

Judgment in each case was rendered for the plaintiff, and the defendants appealed to this court.

*Israel T. Williams*, for appellants, cited the following cases: *The Dawn*, Ware's R. 490; *The Niphon's Crew*, 3 Law Reporter N. S., 288, 289; *The Dawn*, Davies' Rep. 142; 1 Peters' Adm. R. 253; *The Saratoga*, 2 Gall. 477; *Cloutman v. Tunison*, 1 Sumn. R. 373

*Benjamin D. Silliman* and *James B. Bullock*, for respondents cited *Curtis' Rights, &c.*, of Merchant Seamen, 271; 2 *Dodon's R.* 403; 3 *Kent Com.* 183, *et seq.*; *Porter v. Andrews*, 9 *Johnson*, 350; *Dunnell v. Tomhagen*, 3 *id.* 156; 11 *id.* 279. &c.

**DALY, J.**—Upon the facts shown, the first question that arises is, whether the plaintiffs can claim wages up to the time when the voyage was put an end to by the condemnation and sale of the vessel at Pernambuco. It is insisted, on the part of the defendants, that, as the voyage was not completed, but was interrupted, and its further prosecution rendered impossible from no act of theirs or of their agents, but from inevitable casualty, no freight was earned by the vessel, and that that puts an end to all claim on the part of the seamen for wages. The repairing of the ship, and the further prosecution of the voy-

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age by her, was not a physical impossibility. As long as the keel of the vessel remained, it was possible to restore her to her former condition; but where the expense of repairing her—as was the fact here—would be equal to her full value, the owners are under no obligation to repair, but may treat the vessel as an entire wreck, and dispose of what remains of her.

The policy of connecting the interests of the seamen with the safety of the ship is deeply rooted in the maritime law; and as that law has been understood and expounded in England and in this country, in France and in Sweden (*Pardeasus, Lois Maritime*, Tom. 3, pp. 120, 250), it would warrant the impression that it was a general maritime rule that seamen lose their wages if the vessel is lost before the end of the ~~voyage~~, unless freight is earned sufficient to pay them, or enough is saved for that purpose of the materials of the vessel. To which has been superadded in England the doctrine that wages depended upon the earning of freight, or, as it has been expressed in the form of a maxim, that “freight is the mother of wages.”

But there has never been such a general maritime rule. It has become the law of France, by the marine ordinances of Louis XIV, of 1681, attributed to Colbert; of Sweden, by the ordinance of Charles XI (3 Pard. 170); and has crept into the English law, with no higher authority for it than the source from which the ministers of Louis XIV. would seem to have derived it. That authority is a very doubtful construction given by French writers to the third article of the *Laws of Oleron*, a compilation formed about the year 1150 for Eleanor, Duchess of Guienne, relating solely to the navigation of the Sea of Gascony, and from Bordeaux to Rouen. (Azuni, Part I, Chap. IV, Art. X.) The clause relied upon in the article is a provision requiring seamen, in case of wreck, to use their best endeavors to save as much of the vessel and cargo as possible, and obliging the master to allow them a reasonable compensation from the proceeds of the property saved, to carry them back to their own country. If this clause warrants the construction put upon it, and it can fairly be inferred from its provisions that

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the wreck of the vessel releases the owner from the payment of wages to the seamen, then it stands alone as a solitary regulation by a French duchy for the government of a very limited commerce on the western coast of France. Nothing of the kind is to be found in the *Consolato del Mare*, a code that from the ninth century had the authority of law from the banks of the Tiber to the Euphrates. (Boucher's *Consulate de la Mer*, Vol. I., *dedication*.) In the laws of Wisbury, a city of the Baltic built by the Goths, and formerly the most flourishing commercial mart in Europe, whose maritime regulations were far more widely extended than those of Oleron, for they were adopted by all the nations of the North (Olans Magnus *Histor.* Book X, chap. 16; ~~Holste~~stein's *Comment.* p. 118), the mariners got their wages where they exerted themselves to the utmost of their power to save and preserve the merchandise (Art. XV.); and throughout this justly celebrated code there is no provision, nor anything warranting the inference that seamen at stipulated wages, who have faithfully done their duty, forfeit or lose all their wages if the ship is lost before the completion of the voyage; but in my judgment the contrary is inferrable. Arts. 30, 32, 25, 15, 16, 19. Nor in the Laws of the Hanse Towns of 1597, which at one time embraced a confederation of sixty-two commercial cities—among them the great commercial marts of Lubec, Antwerp, Hamburg, Bremen, Dantzic and Cologne—is there any provision for the forfeiture of wages by shipwreck, except where the mariners refuse to assist the master to save and preserve what can be rescued from the wreck. As I understand the forty-fifth article, in connection with others, the voyage is regarded as at an end, when nothing more is to be done in saving and preserving what may be rescued from the wreck, and that for the services rendered up to that time, the master is bound to reward and satisfy the seamen. When that was done, all further claim under the contract was at an end, except that the master was bound to pay the charge of their journey home. Indeed, those laws, though exacting rigorously the faithful discharge of duty, are, as respects the equitable right

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of the seamen, characterized by a broad and liberal spirit. After a careful perusal of the code, I find nothing in it countenancing the stern rule of forfeiture which the French writers have deduced from the laws of Oleron, and which has crept into the maritime jurisprudence of England. The laws of Oleron were introduced into England as early as the reign of Richard I.; but it does not appear that the English court derived this rule from that code, or from any examination of the more important and extended maritime code of Europe, but as appears from the reports of *Blackwell v. Clark*, and *Cullen v. Andrews* (1 Keble, 68, 831), from what was understood to be the *custom of merchants*.

But if such a rule was established by the code of Oleron, or existed as a maritime usage or custom among the nations that navigated the North and Baltic seas in the middle ages, there were rights and privileges then exercised by seamen over the conduct and management of the voyage that no longer exist, and which would tend to divest such a rule of much of its rigorous character.

In the early commerce of these nations the seamen were joint adventurers and partners in the enterprise. By the law of Oleron, Art. XVI, the mariner might freight his own share or be allowed for it in proportion to the ship's general freight. The master was bound to consult the crew in every case of emergency. It was a general sea law, that he should not sail out of a port, nor weigh or drop anchor, cut masts or cable, or indeed do anything of consequence, whatever might be the danger, without the advice of the majority of the crew. He was bound to call them together and consult them, and, in many instances, the majority of the mariners determined what should be done. (Law of Oleron, Art. II, Judge Peter's note, 1 Pet. Adm. R.; Law of Wisbury, Arts. 14, 38.) Nor could he pawn or pledge the ship, her tackle or furniture, without their advice, nor could she be abandoned as a wreck without their consent, and by the general regulation the master was chosen by the seamen. In our day a very different state of things prevails. The contract of the

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seaman is the ordinary contract of hiring. He is employed for a certain service, at a stipulated rate of wages, and has no voice in the management of the vessel or of the voyage, but is entirely subject to the control and direction of the master. He is a hired laborer and nothing more. The owner may secure himself against loss by an insurance upon the vessel and freight, but seamen are precluded, from well-founded reasons of public policy, from insuring their wages. *Icard v. Goold*, 11 Johns. 279. Nor are they entitled to their wages out of the insurance effected upon the freight by the owner. *Finck v. The Ship Penelope*, 2 Pet. Adm. 276; *Percival v. Hickey*, 18 Johns. 257. To sustain a rule, therefore, which visits upon the meritorious seaman a total deprivation of wages for an event which he cannot control, requires something more to support it than the fact that it can be traced up to the usages and customs of the rude, or but partially civilized, nations that navigated the northern seas in the middle ages; the more especially, when no trace of such a principle is to be found in the Roman law, nor in the laws of those enlightened commercial nations that at the same period navigated the Mediterranean. *Pardessus, Lois Maritime*, Tom. 1, 325, note 3; *The Dawn*, Davies' R. 133. If the experience of modern times has pointed out the necessity of giving the master exclusive control in the management of the vessel, some consideration is due to the changed condition of the mariner. Seamen are not co-operators now, but mere servants, and if their rights are not to be interpreted by the principles which govern in ordinary contracts for hire and service, the reason must be a very strong one which makes their case an exception.

That reason is given in the first English case in which the policy was recognized, at least, the earliest English authority for it, that I have been able to find, is an anonymous case in *Siderfin* (1 Sid. 179), decided in the reign of Charles II, which is probably one and the same with *Blackwell v. Clark* (reported in 1 *Keble*, 684). Both reports are very imperfect, and all that can be gathered from them is, that it was a prohibition against a suit in admiralty for seamen's wages in a case where the vessel was lost,

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and that, according to the report in *Siderfin*, "it was agreed that, if the ship does not return, but perishes by tempest or by enemies, the mariners lose their wages, for if the mariners could recover their wages in such cases they would not use their best endeavors or hazard their lives to save the ship," and it was upon the authority of this case and another one (*Cullen v. Andrews*, very imperfectly reported in 1 *Keble*, 831), that Malloy, the earliest English writer upon maritime law, incorporated in his work the general doctrine which has since been acted upon in England. Malloy, 8th ed. 249, 274.

Regarded as authorities, *Siderfin* and *Keble* have been uniformly treated as of no value. A cotemporary judge, Dolbin, J., in *Rex v. Lee* (1 *Show.* 252), declared that *Siderfin* was a book fit only to be burned. In *Hanson v. Leveridge* (2 *Vent.* 242), the court would not be governed and refused to regard as law an opinion reported by him. And in *Huyward v. Wilson*, Holt, C. J., said that many good cases had been spoiled by him; that he reported neither with the truth nor with the spirit that the case required. And in respect to *Keble*, it is said, in Mr. Wallace's *History of the Reporters* (p. 207), that Mr. Justice Park burned his copy, not wishing to lumber his library with such trash. Resting, therefore, upon the statement of two discredited reporters, this case is not entitled to be regarded as a controlling authority. If it is entitled to any weight at all, it must depend altogether upon the soundness of the reasons alleged to have been given for the judgment.

In the same reign a case came up before Chief Justice Saunders at *Nisi Prius*, which is reported in 2 *Show.* 283, a book which Chief Justice Holt in *Tate v. Whilney* (11 *Mod.* 196) would not allow to be of any authority, which Lord Hardwicke also declared in *Garth v. Colton* (1 *Ves. sen.* 525) to be of no authority, an opinion confirmed by Lord Abinger in *Sunbolf v. Alfred* (3 *Mees. & Welsb.* 253). The facts of the case are not given, but it is stated that the Chief Justice ruled three propositions: "1. That freight is the mother of wages, and wherever freight is due wages are due. 2. If a ship be lost before it come to the last

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delivering port no freight or wages are due. If lost afterwards, it is due to the last port of delivery. 3. Where advance money is paid before and in part for freight, and so named in the charter party, although the ship be lost before it come to the port of delivery, yet wages are due according to the proportion of freight paid before, and the freighter cannot have the money."

It is to this case that we probably owe the origin of the maxim that freight is the mother of wages, the soundness of which I shall hereafter examine; and all that it is necessary to say in respect to the case is, that it is not consistent with itself. The third proposition does not follow as a consequence of the first: for if freight be the mother of wages, then, in the case put by Saunders, no freight was earned: and the fact that the freight had been paid for in advance gave the seamen no claim upon a fund to which the owner of the vessel had no title. Upon this point—which would seem to be the only question before the court for decision—the case has long ceased to be an authority. It was expressly repudiated in *Watson v. Duykinck* (3 Johns. 336), where it was held, that the owner was bound to refund freight paid in advance when the vessel was shipwrecked and the voyage broken up. There is another anonymous case (1 Ld. Raym. 539; 3 Salk. 23; 12 Mod. 442), in which Lord Holt, certainly a very great authority, is reported to have held, that "if a ship be lost before the first port of delivery, then the seamen lose all their wages; but if after she has been at the first port of delivery, then they lose only those from the last port of delivery." In the several reports of this case, also, the facts are not given. It does not appear what was decided. The opinion attributed to Lord Holt would be entitled to great weight if it rested upon the authority of reliable reporters; but the 3d of Salkeld was published after the death of the reporter whose name it bears, and the book has never been regarded as of any authority. Wallace's Reporters, 247. The accuracy of the cases in 3d Ld. Raymond has been repeatedly questioned.

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1 Burr. 36; 3 Term. R. 261; and the Modern Reports, except a few volumes, are of little weight as books of authority.

In *Hernaman v. Bawden* (3 Burr. 1844), the plaintiff shipped for a voyage to Newfoundland, and thence to some port in the Mediterranean. The vessel went to Newfoundland, took in a cargo of fish, but was captured on her voyage from Newfoundland to the port of delivery. The plaintiff brought an action for his wages, but it was held that he could not recover. "The ship was lost," said Yates, J., "before its arrival at the port of delivery; and, as the freighter lost his cargo, the mariner ought to lose his wages."

The next case in which the question arose was *Abernethy v. Landale* (Doug. 539), decided by Ld. Mansfield in 1780. The plaintiff, the second lieutenant on board a letter of marque which had been captured by the enemy in the course of her voyage, brought an action to recover his wages. It appeared in the case, that the ship, prior to her capture, took a Spanish vessel, of which the plaintiff was appointed prize master, and that he carried the prize into Lisbon, and remained there in charge of it until it was disposed of by the agents of the owners of the capturing vessel, when he returned to England. He claimed to recover wages, on the ground that he had continued in the defendant's employment until his return to England; that, having been absent in the defendant's employment at the time of the capture of the vessel, he had no opportunity to exert himself in her defence, and that therefore the reason of the rule, by which seamen lose their wages upon the loss of the vessel, did not apply in his case, or that, at all events, he was entitled, upon a *quantum meruit*, to a sum equal to his wages for the care he had taken of the prize. In the decision of the case, Ld. Mansfield distinguished between the double capacity in which the ship set out, as a privateer and as a trader, and held that as a privateer the crew were to share in all prizes taken; and the plaintiff having received his share of the prize, he had no more claim on that head, while all demand on account of the trading voyage was gone. "As a sailor," he said, "on board a ship on a tra-

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ing voyage, he is entitled to nothing, for freight is the mother of wages, and the safety of the ship the mother of freight."

In *Dunnell v. Tomlungen* (3 Johns. 154), the ship, upon a voyage from Greenock to New York, was abandoned at sea as a wreck. The crew exerted themselves to save some of the cargo, and succeeded in stowing away seven boxes of merchandise in the long-boat, to which they took for safety. After being some time at sea, they were picked up by a vessel bound to New York, to which they were brought with the long-boat and merchandise, which were sold at auction by the consent of all parties, and the proceeds of the merchandise were received by the owners of it. The crew of the receiving vessel libeled the lost boat and merchandise for salvage, but the libel was dismissed upon the ground that the long-boat was not in a sufficient state of peril to entitle them to claim as salvors. The plaintiff, one of the crew of the lost vessel, then brought an action against the master for wages, on the ground that freight had been earned upon the seven boxes of merchandise, which freight, if recoverable, it was admitted, was sufficient to cover the seamen's wages.

The plaintiffs had judgment in the court below, but it was reversed by the Supreme Court, upon the ground that no freight had been earned. Kent, C. J., following Lord Mansfield, declared it to be a general rule of the marine law, that freight is the mother of wages, and the safety of the ship the mother of freight; that the reason of the rule was, that the seamen might have an interest in the safety of the ship, and be induced not to desert her in case of danger, but to use their utmost endeavors, even at the hazard of their lives, for her preservation; that no freight was earned, as no part of the cargo was delivered by the ship; that a salvor, and not the ship-owner, was the deliverer of the goods saved; that it was not the saving of the cargo, but the earning of freight, that entitled a seaman to wages and that, consequently, no wages were due to the plaintiff, but he suggested that the plaintiff might possibly have a valid lien upon the goods saved for an equitable compensation in the light of salvage.

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The case was submitted for the opinion of the court without argument, and for the present it is sufficient to say respecting it, that the observation, that the plaintiff might recover an equitable compensation in the light of salvage, is not in accordance with what is now regarded as the law. *The Massasoit*, 7 Law Rep. 522; *The Starr*, 4 id. 487; *The Neptune*, 1 Hagg. Adm. R. 227; *Nesmer v. The Suffolk Bank*, 1 Law Rep. 249; *The Wave*, 2 Paine's C. C. Rep. 147. And that, by the authority of numerous cases, the delivery here was sufficient to entitle the master to recover freight, upon which the seamen had a maritime lien for their wages. *Lutuige v. Gray*, cited in Abbott on Shipping, 438; 2 Saund. Pleading & Ev. 2 Am. ed. title Freight, p. 80; Abbott on Shipping, 451; Smith's Mercantile Law, 273.

In *Icard v. Goold* (11 Johns. R. 279), Platt, J., said incidentally, that "the maxim that freight is the mother of wages implies that if the freight be totally lost by desertion, peril or force, without fraud or misconduct of the masters or owners, the seamen lose their wages; that this has been adopted as a rule of policy, to secure the fidelity and stimulate the exertions of the crew, and all seamen are presumed to know the rule and contract with reference to it. The seamen and owners must be deemed common sufferers. Wages cannot be exacted by the unfortunate seamen from the still more unfortunate owners."

In *Henop v. Tucker* (2 Paine's C. C. R. 160), the vessel in the course of the voyage put into the harbor of Cork, in so damaged a condition that it was found that the cost of repairing her would be equal to five-sixths of her value. She was accordingly abandoned to the underwriter, and was sold. The voyage being broken up, the plaintiff, a seaman, was discharged, and the action was brought to recover two months' wages under the act of Congress, the plaintiff having been left in a foreign port. Justice Thompson held that, by the abandonment and sale of the vessel and the breaking up of the voyage, the plaintiff had lost all claim to wages, but appears to have been satisfied with the conclusion he was compelled to adopt, regarding it to be the law. He undertook, in a lengthy opinion, to explain what the rule was, and the

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grounds or reasons upon which it rested. He says: "It is the general rule of the marine law that freight is the mother of wages, and that if no freight is earned no wages are earned. It is the settled rule, that in cases of shipwreck, where there is a total physical destruction of the vessel, this will dissolve the contract for wages. \* \* The loss of wages grows out of the loss of freight and the breaking up of the voyage, so that no further beneficial service can be rendered by the seamen. \* \* The ground upon which the rule rests must grow out of the nature of the seamen's contract and depending upon some principle of public policy from the nature of the service. In case of wreck or capture, the seaman's contract, without any express stipulation to that effect, is considered contingent and the wages lost. The law annexes or implies a condition, that where the voyage is broken up by some peril or *vis major*, without the fault of the master or ship-owner or any of the parties concerned in the navigation of the vessel, the seamen's wages are gone. The doctrine grows out of principles of public policy, to stimulate seamen to every possible exertion to save the vessel, knowing that their wages depend upon that."

In *The Lady Durham* (3 Hagg. Adm. R.), the vessel and cargo were totally destroyed by fire in the harbor of Ascension, before the completion of the voyage. It was held that the seamen lost their wages. Sir John Nicholl put it upon the ground that no freight had been earned, but in view of some adjudged cases found it necessary to remark, that it did not follow, in all cases, that if there be no freight there can be no wages.

In *The Niphon* (3 Law Rep. [new series] 266), there was a total loss of vessel and cargo. The seamen brought an action *in personam* for their wages, in the United States Court for the district of Massachusetts, but it was held that they could not recover. A very strong effort was made in this case to overturn the rule but it was regarded by Justice Woodbury as too well settled.

In reviewing these cases, the question naturally suggests itself, what is the rule so frequently referred to as well settled? Is it that the right to wages grows out of and depends upon the

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earning of freight, and that the seamen lose their wages if no freight is earned? Does this deprivation depend upon the total physical destruction of the vessel or upon the total loss of vessel and cargo, or does it arise where there is a breaking up of the voyage without any fault on the part of the master or owner? If the cargo is lost, but the vessel is saved, do the seamen get their wages? If they do, then, it does not depend upon the earning of freight. On the other hand, do they get them where the vessel is lost and the cargo is saved? If they do, then the safety or preservation of the vessel is not essential to the right. The reasons for the rule are constantly suggested, while the rule itself is left in so loose and undefined a shape as to make it very difficult, by the aid of these cases, to ascertain what it is.

The cause of the difficulty is the assumption and constant reiteration, throughout these cases, of the maxim, that "freight is the mother of wages," the logical deduction from which would be, if the maxim is true, that wages grow out of and depend upon the earning of freight. That, as has been said by several judges, seamen get no wages if no freight is earned. It will be found, however, upon a full examination of the law, that the loss of wages is not founded upon the failure of the vessel to earn freight, but upon a rule of public policy. Before proceeding, however, to point out what that rule is, and the grounds of public policy on which it rests, it will be necessary first to show that wages do not depend upon the earning of freight, and that the maxim as expressed by Lord Mansfield, that "freight is the mother of wages and the safety of the ship the mother of freight," has no foundation in the law. Neither branch of the proposition is true, for seamen may be entitled to wages where no freight is earned, as where a vessel goes upon a voyage in pursuit of freight and returns without getting any; or in cases of jettison, where the cargo is thrown overboard, but the vessel is brought in safety to the port of destination; or where vessel, crew and cargo are lost, but part of the hull and some of the stern are saved by strangers; or where, without fault on the part of the mariners, the vessel and cargo are condemned for illegal trading, or by an ally for want of

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proper papers; in all of which cases no freight is earned, but the seamen get their wages. *The Malta*, 2 Hagg. Adm. R. 158; *The Neptune*, 1 id. 229; *The Reliance*, 2 Wm. Rob. 119. And so in respect to the earning of freight; it may be earned though the vessel is totally lost, if the cargo, or any part of it, is saved and delivered to or accepted by the owners; in which case, the seamen have a maritime lien upon it to the extent of the freight earned. *Luke v. Lyde*, 1 Wm. Bl. 190; *Hunter v. Principe*, 10 East, 378; *The Dawn*, Davies' R. 142; Mar. Ord. of France, title 3, § 21, and the cases and elementary works before cited. Thus, in the recent case of *Bernard v. Adams* (10 How. [U. S.] R. 107), where the vessel was abandoned as a wreck, but the cargo was ~~saved~~, it was adjudged upon general average that the seamen were entitled to their wages, and in *Lutwige v. Grey (supra)*, where part of a lot of tobacco was saved from shipwreck and accepted by the owner, it was held that full freight was due for the part saved, though a portion of it was so damaged as to be valueless.

"The natural and legal parent of wages," in the language of Lord Stowell (*The Neptune*, 1 Hagg. Adm. R. 227), "is the mariner's contract and the performance of the services covenanted for therein. They in fact generate the title to wages." His right is founded upon the fulfillment of his contract, and he has, by way of security, a maritime lien, as old as the laws of the sea, upon the ship, which attaches as long as a fragment of the vessel remains (Consulate de la Mer, Ed. of Pardessus, chap. 182; *The Neptune, supra*), together with a lien upon the cargo, to the extent of the freight earned, founded upon a principle extensively applied in the civil law, that he has contributed by his labor and services to earn it. Emerigon, *Traite des Assurances*, art. 17, 53; Mar. Ord. of France, book 3, tit. 4, § 19; *The Dawn*, Davies' R. 182. It is very true that the earning of freight is the end proposed by the employment of the mariner and by the prosecution of the voyage, and that it is ordinarily the fruit of his service. But it may or may not be, as in the cases before suggested. The mariner does not engage that the vessel shall

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earn freight, or stipulate that if it does not he will make no demand for wages. The scope and extent of the obligation to which he pledges himself in the formation of the contract, as declared by Lord Stowell, in the case of the *Neptune* (*supra*), is that "he will, to the utmost of his ability, navigate the vessel, not only in favorable but in adverse weather, and exert himself, in the event of disaster or shipwreck, to save as much of the vessel and cargo as he can." It is not, then, the earning of freight, but the faithful performance of the obligation, that entitles him to wages, subject only to the risk of losing them when the vessel and cargo are totally lost before the completion of the voyage. It is idle, then, to talk about freight being the mother of wages, in the sense that wages grow out of or depend upon the ~~earning~~ of it. The earning of it gives the mariner an additional security for his wages, as he acquires thereby a lien upon the freight in addition to his lien upon the ship, and this is all that it generates or produces to entitle it to be denominated the mother of wages. The hope and expectation of earning it, as before remarked, lead to the employment of the mariner and the prosecution of the voyage, in which remote and fanciful sense it may be said, figuratively, to be the mother of wages—a sense which attaches no value to it as a legal maxim. I apprehend that this doctrine crept into the English courts, through a practice of the London merchants, by which the contract with the seamen was generally so contrived as to make the wages depend upon the performance of the voyage or the earning of freight. Grose, J., in *Culler v. Powell*, 6 T. R. 324; *Edwards v. Child*, 2 Vern. 727; *Appleby v. Dodge*, 8 East, 300. In addition to which, it had long been the custom, in the commerce of the Baltic, not only for seamen to engage at a stipulated rate of wages for the voyage, or by the month, but to freight their share, or to agree that their compensation should be regulated or depend upon the amount of freight earned, as it is usual now for the compensation of a merchant's clerk to be regulated by a per centage upon the profit made in the business of his employer. We find, even in the French commercial code of the

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present day, this class who engage for the profit of the voyage distinguished as a less favored class than those who engage at stipulated wages. Art. 257. Si les matelots sont engagés au profit ou au fret, il ne leur est du aucun dédommagement ni journées pour la rupture, le retardment ou la prolongation de voyage occasionnées par force majeure. Art. 260. Les matelots engagés au fret sont payés de leurs seules sur le fret, à proportion de celui que reçoit le capitaine. Code de Commerce, Liv. II., Tit. V. Of course, if no freight was earned, the seamen so engaging got nothing. I think it very probable, therefore, as the English courts at that time had but a very imperfect knowledge of the maritime law, that they applied to seamen in general a rule applicable only to this class. They did not, as before remarked, derive the rule laid down in *Siderfin* from any investigation of the maritime codes of Europe, but from what was assumed to be the custom of merchants; and when, to mitigate the hardship of that rule, or to limit it to general operation, Saunders declared that if a vessel stopped at an intermediate port, and by delivering cargo earned freight, the seamen got their wages up to that time, the distinction may well have served to perpetuate the error, by affording some foundation for the belief that wages depended upon the earning of freight. But in whatever way the error originated, the doctrine must now be regarded as repudiated. "It was formerly the doctrine of the English courts," says Ware, J., in *The Dawn* (Davies' R. 133), "that freight was the only fund out of which wages could be claimed, and that where no freight was earned no wages were due;" but he considers the doctrine overruled in England by the case of the *Neptune* (*supra*), and declares that it was never received in this country but with material qualification. While Beits, J., a judge of long and great experience in the administration of the maritime law in the city of New York, characterizes this doctrine as an old figment of law exercised oppressively against seamen, 1 Abbot Adm. R. 131.

Dismissing, then, this oft-repeated assertion, that wages depend upon the earning of freight, and that wages are lost if no freight

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is earned, as a fallacious assumption, the long adherence to which has tended to embarrass and confuse the law, we approach to a true understanding of the rule or principle by which the wages of the seamen are bound up with and may depend on the fate of the ship. It is, as before suggested, a rule of public policy, and is to be taken as originally laid down in the anonymous case in Siderfin, "that if the ship perishes by tempest or enemies, the mariners lose their wages," and as resting upon the ground of public policy there assigned, that "if it were otherwise the seamen would not use their best endeavors, or hazard their lives to save the ship." "The *total* loss of the ship," says Lord Stowell, "in the case of the *Neptune* (*supra*), occasioned solely by the act of God visiting the deep with storm and tempest, brings with it the loss of all the earned wages (except advances), although the general rule of law is, that the act of God prejudices no man."

This rigorous, harsh, and inequitable rule, in its operation upon seamen, is founded upon a distrust which makes them an exception to every other class of laborers. A similar distrust, in respect to the calling of common carriers and inn-keepers, has subjected them from the earliest times to liability in the event of the loss of goods entrusted to their care; but the grounds upon which their responsibility is founded afford no countenance for the extraordinary extent to which the liability of mariners is carried by the rules we are considering. The elementary writers upon the law of bailment unite in assigning, as the reason for the extraordinary liability of common carriers and inn-keepers, the temptations to which such persons are under to purloin the property entrusted to their care, the ease and facility with which they may combine with thieves and robbers, and the difficulty of detection and of recovering the lost property in such cases, a distrust which Sir William Jones, quoting from an ancient author, calls "the sinew of wisdom." Jones on Bailment, 107. But the case of common carriers and inn-keepers is very different from that of seamen. They have what the seamen have not—the power of direction and control. It is conceivable in their

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case that, by extraordinary care and diligence, loss may be prevented. The carrier undertakes to do, for reward, in a public capacity, what it is, at least, possible for him to do, and there may be no injustice in holding him responsible for the goods, where their carriage and safe delivery are an act at least within the range of human possibility, and as the stranger guest confides himself and his property to the care of the inn-keeper, and it is in the inn-keeper's power, by the exercise of extraordinary vigilance, to protect it, there is equally no injustice in holding him to a similar responsibility. It forms a part of their business and enters into the contract they make, the one engaging for the safe delivery, and the other for the safe-keeping, of the goods. But such is not the case with the seamen. They do not undertake that the ship and cargo shall be brought in safety to her port of destination, for they cannot be said to contract to do what might be impossible. All they engage to do is, to use their best efforts to accomplish that end, and, when they have done that, they have done all that is comprehended by their contract. The liability of common carriers and inn-keepers, moreover, is circumscribed within a limit that is just and reasonable, and when that limit is reached their liability ceases. The carrier is absolved from all liability where the loss is occasioned by the act of God, *i. e.*, inevitable accident or casualty, or through public enemies; and in the case of the inn-keeper, negligence is presumed in the event of loss, which he may, however, rebut by showing that it occurred by the negligence of the traveler, or was the result of inevitable casualty or of superior force. Story on Bailments, § 472. But in the case of the seamen there are no excepted perils. When the vessel and cargo are lost they lose their wages, however extraordinary their vigilance or untiring their exertions. They incur this forfeiture when every human effort must give way to a power in the elements, which they have neither the skill to avert nor the means to control, and the question presents the simple consideration, whether, in addition to the hardships that beset the hazardous vocation of the mariner, it is essential, to secure the faithful discharge of his duty,

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that he should forfeit his wages, though the vessel is lost by the irresistible power of wind and waves.

To assume, as matter of law, that the mariner will not do his duty unless he knows that his wages depend upon the preservation of the ship, and the safe transportation of the cargo, is to adopt a conclusion not based upon that universal experience which is essential to warrant such a general presumption. Legal presumptions are the natural conclusions drawn by the mind from that knowledge of the usual course of things, which is furnished by ordinary observation and experience, and when such presumptions are founded, as they frequently are, upon a knowledge of human motives or of the springs of human action, they must be founded upon that which may be predicate<sup>d</sup> of mankind in general. To presume, therefore, in respect to seamen, that they will not use their best endeavors for the preservation of the ship unless they know that they will lose their wages if the ship is lost, is to build a presumption on very uncertain premises. The natural desire for the preservation of their own lives may be quite as strong as with the majority of men—a stronger motive to labor for the preservation of the vessel than the hope of pecuniary reward. Mariners, moreover, are quite as distinguished for acts of disinterested heroism and devotion to duty as men of any other class, and that a rigid rule like this is not essential, to stimulate them to the full performance of their duty, is sufficiently attested by the maritime character of the seamen of the many intelligent commercial nations, both ancient and modern, among whom no such rule has ever prevailed. 4 Pardessus, Lois Maritime, 82, Art. 12. There should be, undoubtedly, a strong motive to induce the seaman to peril his life and person for the preservation of the vessel, as not only the safety of the ship and cargo but the lives of all on board may depend upon his exertions, and it is both politic and just that his right to compensation should depend upon the fidelity, faithfulness, and courage with which he discharges that perilous service; that he should forfeit all his earned wages if he has not exerted himself to the utmost to save the vessel and

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cargo, or to rescue whatever may be saved from the wreck. This is the qualification of the rule established by the recent English statute (17 and 18 of Vict., c. 104, A. D. 1855), which enacts that, "No right to wages shall be dependent on the earning of freight; and every seaman and apprentice who would be entitled to demand and recover any wages, if the ship in which he has served had earned freight, shall, subject to all other rules of law and conditions applicable to the case, be entitled to claim and recover the same, notwithstanding that freight has not been earned; but in all cases of wreck or loss of the ship, proof that he has not exerted himself to the utmost to save the ship, cargo, and stores, shall bar his claim." Art. 183. This is all that can be rationally or reasonably demanded upon grounds of public policy, for to make his wages depend, as a further inducement to exertion, upon the ship and cargo being brought safely to the port of destination, which may be impossible, is to treat the most meritorious services as of no consideration, unless they are aided by the chances of fortune. If the seamen had, as they formerly had, any voice in determining what should be done in times of peril and danger, there might be some show of reason in making their wages depend upon the fortunate results of their efforts. But now, with a direct interest in the result, they can do nothing to protect that interest that may be contrary to the views of the master appointed to control and direct them. They have not, as they formerly had, the choice of the person to whom the management is confided. They may all be of opinion that the course pursued by the master is not the best adapted to secure the safety of the ship, but they cannot follow the dictates of their own judgment, but must implicitly obey and execute his orders. To hold, them, therefore, responsible to the extent of their wages, for a result which may spring from the incapacity of the master, or which may be inevitable under any circumstances, is to impose responsibility to an unreasonable extent. Where they are without any of the rights or advantages of joint adventurers, but the enterprise is projected for the profit and benefit of the owners, who take upon themselves

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the choice of the person who shall guide and direct it, certainly the loss should fall upon them if they have chosen unwisely, or if, subject to the risk which attends all such enterprises, it should result in the inevitable loss of vessel and cargo. In no other case of hire or service is it essential that the service should prove beneficial to the employer. If the employed has done all that he undertook to do, he is entitled to his reward. In the case of the seaman, he does not bind himself by his contract to perform impossibilities. He undertakes to do what it is possible for him to accomplish, and, when he has faithfully done that, to deny his right to compensation is to contravene a rule equally enjoined by divine and human law-givers, that the laborer is worthy of his hire.

In those of the continental nations of Europe, in which the forfeiture of wages is enforced against the seaman, in the event of shipwreck, the rule is at least made consistent by releasing him equally with the owner, in the case of wreck, from all further obligation under the contract, so that he is free to assist or not, in the preservation and saving of the wrecked property. Pothier, Cont. Maritime, No. 127; Boulay Paty, Com. de Droit Marit., Vol. II, p. 230; Valin, Com. sur la Ord. Marit., Vol. I., 704. Or in those countries where that duty is very properly enjoined upon him, the rule has generally been so qualified that if he has exerted himself to the utmost of his power to save what he can of the vessel or merchandise, he gets his wages, or an equitable compensation equivalent to wages, up to the time when his services in that respect cease, though when he neglects or fails to do so he forfeits the earned wages. This, I think, may be said to be the law in The Hanse Towns, Hamburg, Lubec, West Capelle, Riga, Wisby, Denmark, and the Netherlands. 1 Pardessus, 471, 522; 2 id., 474, 520, 543; 3 id., 298, 385, 418, 422, 522, 550; 4 id., 84; Degroot, d. l. s., 42; V. D. Keessel, Thes. 694; 2 Mayens, 114. In Sweden it depends upon whether sufficient for that purpose has been saved from the materials of the vessel. 3 Pardessus, 120. By the French code, if the vessel and cargo are *totally* lost by capture

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or peril of the sea, the seamen lose their wages. If, however, some part of the vessel is saved, they are paid out of the proceeds of what is saved; but if that will not suffice, and any part of the cargo is preserved, then they are to be paid as far as the freight upon that will suffice. *Code de Commerce*, Liv. 2, Tit. 5, Art. 258, 259. But the French jurists treat the contract as dissolved by the act of shipwreck, and as operating to release the seamen from all further obligation and duty; so that, if they exert themselves to save anything from the wreck, they do so because it is their interest to secure what they can of their wages.

But such is not the effect of the shipwreck upon the seaman's contract, as the maritime law has been understood and expounded in this country and in England; but the seaman is bound, by what Lord Stowell calls his "covenanted allegiance to the ship," to exert himself to the utmost of his power to save and preserve whatever can be secured from the wreck, and as long as it is possible to render such a service he continues, in virtue of the contract, under the control and direction of the master. *The Reliance*, 2 Wm. Rob. 119; *The Neptune* (*supra*), *The Niphon*, 3 Law Reporter, N. S., 266, 4 id., 496; *The Two Catharines*, 2 Mason, 337; *Pittman v. Hooper*, 8 Sumner, 50; *The Dawn*, Davies' R. 137; *The Massasoit*, 7 Law Rep., 522; *Visner v. Suffolk Bank*, 1 id., 249; *Abbot on Shipping*, Part 5, Chap 2, p. 271, 6th Am. Ed.; *Curtis on Merchant Seamen*, 287, 289. No principle is now better settled in the Admiralty Courts of this country and of England, than that the seaman is bound to render this service by virtue of his contract, and it may now also be regarded as well settled, that he cannot for performing this service have any claim as a salvor, who is under no contract, but is a mere volunteer interposing for the rescue and preservation of wrecked property. If, then, the seaman is bound to labor for the preservation of the wrecked property, and cannot for that service claim as a salvor, the contract continues in force as long as that service continues to be rendered, and its obligations must be reciprocal, for if it is binding on one party

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it must be binding on the other. If the seaman is not discharged from the contract by the act of shipwreck, as the French jurists have held, but is bound to labor and service under it as long as a fragment of the vessel or of the cargo can be preserved, neither can the other party be discharged from the obligation to pay him the stipulated wages, as long as he continues in the performance of duties growing out of his contract.

The service in such case continues unaffected by the act of shipwreck, until the services of the seamen are no longer necessary, to which time he is entitled to all the earned wages according to the stipulation of the contract. Both parties are then released from all further obligation under it, and the voyage or adventure is at an end.

The gross injustice of denying the seaman's right to compensation for discharging a duty, that he was held bound by the contract to perform, has been so apparent that we find courts giving him wages in such cases, but calling them by a different name, such as salvage or *quasi* salvage, at the stipulated rate of wages, or wages in the nature of salvage. But it is wages, and not salvage, that he is entitled to. *The Massasoit, supra.* The right to them does not grow out of the fact that enough has been saved from the vessel to pay them. His claim upon the ship arises from his lien, which is a security collateral to the principal contract. It is not created by the act of shipment, but existed from the beginning and is never extinguished as long as anything remains of the vessel. This being the construction of the law, and it is inevitable from the doctrine, that the seaman is bound by the contract to exert himself to the last, to save and preserve what he can from the wreck, it follows that a forfeiture of wages can take place only in cases where there is a total loss of vessel and cargo. This is the only conclusion that will harmonize this doctrine of the extent of the seaman's obligation, under the contract, with the stern rule of forfeiture laid down in *Siderfin*. It is not necessary to carry that rule further than in the language in which it is laid down in that case: "the seamen lose their wages if the vessel is captured by enemies or lost by tem-

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pest," by which Lord Stowell would seem to understand a total loss of the vessel, and which, in my opinion, is all that the reason of the rule requires to support it as a rule of public policy. It is a very hard one at the best, now repudiated by the legislation of the enlightened commercial community from which we derived it, and I am not disposed to carry it beyond the strictest limits of the reason assigned for it. We are told in *Siderfin* that it was agreed, that if seamen got their wages when a vessel was captured by enemies or lost by tempest, they would not use their best endeavors or hazard their lives to save the ship, and in other cases that, upon grounds of public policy, such a general rule is essential to stimulate them to exertion. The object aimed at, in my judgment, is sufficiently accomplished, when it is known among seamen that they will lose their wages if the vessel and cargo are totally lost, and that public policy does not demand that this forfeiture should be enforced in cases where, by the persevering efforts of the crew, the vessel is brought into port, though in so disabled and damaged a state, from the perils encountered, as to be valueless for the further prosecution of the voyage. Reward and not forfeiture should, in my opinion, be the fruit of such a service; as in Spain, where it is rewarded by compensation over and above wages. Ord. of Philip II., of 1563. And I think it a reproach to the law to hold as was held, in *The Wave (supra)*, that because the vessel was abandoned to the underwriters, and the cargo, being salt, was so damaged as to be valueless, that the seamen, through whose resolute efforts the disabled ship was brought into the harbor of Cork, were entitled to nothing. "Wages cannot be exacted," said Pratt, J., in *Icard v. Goold (supra)*, "by the unfortunate seamen from the still more unfortunate owners;" but that learned judge forgot to distinguish that the two cases are very different, that the owners can secure themselves against loss by an insurance upon the vessel and freight, while seamen are precluded from insuring their wages, upon the ground that, if they were secure of them in any event, they might be indifferent to the discharge of their duty.

My conclusion is, that this rule should be limited to cases

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where there is a total loss of vessel and cargo; that, within that limit, it will have all the effect, as a rule of public policy, that it is essential it should have, and that in all other cases the seamen should get their wages up to the time the contract continues in force and they are engaged in rendering service, if they have faithfully discharged that duty. This rule, while it is more just to the seamen, works no injustice to the owners, who can secure themselves against loss by insuring the vessel and the profits of the voyage. In the case before us, as the vessel, by the resolute and persevering efforts of the crew, was brought in safety into the harbor of Pernambuco, and the cargo thereby secured, all that it was the object of this rule to effect has been accomplished, and the seamen, in my opinion, are entitled to wages up to the time that they ceased to be employed.

In arriving at this conclusion, I feel the full weight of departing from what may be regarded as precedent, but the lengthened examination I have gone into, upon the state of the law, will be the best vindication for doing so. "A precedent," says Dr. Lieber, in his excellent work on Legal Hermeneutics, "ought to be sound; it ought to come from good authority, or a period that we consider favorable to a thorough and sound view of the subject in question. \* \* If we are convinced, after patient inquiry, which includes a thorough knowledge of the subject matter, that we ought in justice to deviate from former decisions, we act wrong in perpetuating that which is unjust or injurious. \* \* That which is wrong in the beginning cannot become right by lapse of time. \* \* Many of the most eminent lawyers and the most philosophical among them, such as Lord Mansfield, have acted upon this principle and overruled what was wrong, though with great caution." Lieber's Hermeneutics, Chap. VII, Sec. XIV.

It has been shown how imperfect are the reports of the earlier cases and unreliable as authorities the books of reports from which the law has been drawn; how limited has been the examination of the subject until very recently, and how difficult and impossible it is to reconcile all the adjudged cases with each

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other. When, therefore, in the conclusion I have arrived at, I have felt called upon to disregard adjudged cases and the authority of some great names, it has been from a conviction that the question was but imperfectly understood and was not fully examined.

But if my brethren should not be prepared to go the length that I have gone, then the judgment of the court below, I think, may be affirmed upon the ground that freight was earned. The vessel having been brought into the harbor of Pernambuco and the cargo thereby secured in safety, it became the duty of the master or owners to complete their contract with the freightors and transport the cargo in another vessel, if it was in their power to do so, to the final port of destination. *Cook v. Jenning*, 7 T. R. 381; *Luke v. Lloyd*, 1 Wm. Black, 190. This, it appears, they did, and whether it cost them more or less than the price for which they had originally agreed to carry it, is wholly immaterial so far as respects the rights of the seaman. His right to wages, when he is not in fault, does not depend upon the performance of service on his part, but he is entitled to them if freight, the carrying of which was the object of the voyage, is actually earned. *Chandler v. Graves*, 2 II. Black, 606, note. In *Wetmore v. Henshaw* (12 Johns. 324), the vessel was captured, and the plaintiff, having been taken on board the enemy's ship, was separated from and did not rejoin the vessel. She was afterwards recaptured, sold by the recaptors for salvage, bought in by the owners, who employed a new crew to navigate her and complete the voyage. In this case, in addition to the amount lost by salvage, the owners had to go to the expense of employing a new crew, *at an increased rate of wages*, to enable them to continue the voyage and carry the cargo to the port of delivery. This increased expense may or may not have been greater than the amount they were to receive originally for freight. That was not inquired into, but the plaintiff's right to wages was upheld, upon the ground that freight was thereafter earned. In the *Louisa Bertha* (14 Jurist, 1007; 1 Eng. Law & Eq. R., 665), the master, in the course of the voyage, executed

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a bottomry bond, binding the ship, her cargo and freight, which was payable upon the arrival of the vessel in England. Upon her arrival in England, the vessel, freight and cargo were libeled for the payment of the bond. The vessel was sold, but the proceeds arising from the sale, together with the amount due for freight, were found to be insufficient to satisfy the bond, so that what remained due upon it was a charge upon the cargo. The seamen claimed their wages from the proceeds of the sale, which was resisted by the owners of the cargo, upon the ground that if the seamen were paid out of the proceeds of the sale, that charge would fall upon them, inasmuch as they would have to pay what was due upon the bond to release the cargo. But though a long arrear of wages was due for several voyages made by the vessel before the bottomry bond was entered into, during which she had earned considerable freight, and though the freight was exhausted to meet obligations necessarily entered into on behalf of the vessel, and it was conceded that the seamen had an ample remedy for the wages against the owner; still it was decreed that they should be paid their wages out of the proceeds of the sale, though the practical effect of doing so was, to impose the burden of their payment upon the owners of the cargo. These cases are referred to, to show how far the courts have gone to sustain the seaman's right to wages where freight has been earned. The defendants rely upon what was said by the court in *Porter v. Armstrong* (9 Johns. 350), to show that, as respects the right of the seamen to wages, freight has not been earned in the case now before us. But the circumstances in *Porter v. Armstrong* were peculiar, and as an adjudication upon the facts, that case is not, as an authority, in conflict with the views here expressed. In that case the seamen refused to proceed with the vessel, when it was their duty to do so, and by that act forfeited their wages. The vessel having put into port to repair, it was found necessary to unload her for the purpose of making the repairs. The seamen had the right to apply, under the act of Congress, for the requisite repairs, but they omitted to do so, and allowed them to be made by the master ship-carpen-

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ter under the direction of the owner. When the repairs were completed, the seamen, not deeming the vessel seaworthy, refused to go to sea in her, whereupon the owners refused to make any further repairs, but reloaded the ship and completed the voyage. In deciding the case, the court were of opinion that when the seamen left no freight had been earned, and this was true; but as the court also held that they left wrongfully, inasmuch as they suffered the repairs to be made by the owner, instead of applying to have them done under the act of Congress, and having thereby brought themselves to abide by the judgment of the master ship-carpenter, they had no claim for wages on the ground that freight was earned afterwards. The court decided, ~~that~~, having refused to abide by the judgment of the master ship-carpenter, and perform the voyage, that was sufficient to excuse the owner from the payment of wages. In the present case, it is sufficient to say, that as the freight contracted for in the beginning of the voyage was actually earned, though, to earn it, the owners were put to a greater expense than the whole of it amounted to, the seamen were entitled to their wages.

This brings up the only remaining question discussed upon this appeal: the finding of the court below upon the question of desertion. It is insisted that the entry in the log-book was conclusive upon that point, and that the court erred in allowing any evidence impeaching or contradicting it. Under the act of Congress of July 20, 1790 (1 Story U. S. Laws, 102, §§ 2, 6), absence, without leave of the master or officer commanding the vessel, for forty-eight hours, if the fact is entered on the log-book upon the day when the seaman leaves, is a forfeiture of wages. This statutory forfeiture is distinct and different from the ordinary maritime forfeiture of wages by desertion. By the maritime law, the seaman must have quit the ship *animo derelinquendi* or *animo non revertendi*, for however blamable his conduct may be, unless it has been so flagrant as to justify his discharge, if he repents and offers to return to his duty within a reasonable time and before another is substituted in his stead.

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he must be received. 3 Kent Com. 257, 7 ed.; *Coffin v. Jenkins*, 3 Story, 108; *Orne v. Townsend*, 4 Mason, 547. The entry in the log-book is evidence of the statutory forfeiture, and, if no other evidence is presented on the subject, it is conclusive. The entry, however, must be a full compliance with the statute, for, in the language of Justice Story, in *Cluteman v. Tennison* (1 Story, 373), "in a case so highly penal, nothing is to be taken by intendment." It must appear to have been entered on the day when the seamen left, and it must appear from the entry that he left without leave. *Pheobe v. Dijunn* 1 Wash. C. C. R. 48; *Douglas v. Eyre*, 1 Gilpin, 152; *Cluteman v. Tennison*, 1 Story, 373. Parol evidence, however, is admissible to falsify the entry in the log-book. *Orne v. Townsend, supra*; *Malone v. The Mary*, 1 Pet. Adm. R., 140; *Whilton v. The Commerce*, ib. 160; *Jones v. The Phoenix*, ib. 201. In the latter case, Justice Peters says "the log-book is, by act of Congress, made legal evidence in proof of desertion, but it is not incontrovertible and conclusive," and again, in *Thompson v. The Philadelphia* (ib. 210), he says, "the entry in the log-book is only *prima facie* evidence," and it never could have been the intention of the act of Congress to declare that the entry should preclude all further inquiry as to the fact of desertion, and thus place it in the power of the master or officer to forfeit the seaman's wages, by simply making an entry in the log-book that he had left the vessel without leave, when the fact was otherwise.

The entry in the log on March 24th, 1851, that the seamen named "abandoned the ship," is not a compliance with the statute. It is not the entry of a fact, but of the writer's conclusion that they had abandoned the vessel. That the seamen left the vessel without leave, must be entered distinctly as a fact, and not conclusions which may or may not imply that fact. On the next day, the 25th, there is no entry of the absence of the seamen in the body of the log. The transactions of the day, relating to the vessel, such as the state of the weather, the amount of cargo discharged during the day, and the fact that both pumps were kept going almost continually, to keep her free, are

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entered, and finished with the words "so ends," but in the margin there is an entry, "the eight men still absent without liberty." Whether the entry, if regularly made, would have been sufficient under the statute, it is not necessary to determine; as the entry was impeached, both by evidence showing that it had been interpolated in the log, and that the fact was otherwise. That the entry was made on the day that it purports to have been, is at least doubtful, as the regular entry for the day in the body of the log appears to have been closed. If it did not occur to the party keeping the log to enter it until after he had completed the regular entries of the day, the natural place for it would seem to have been immediately after those entries; and as it is not there, but the regular entries of the next day follow immediately thereafter, the fact, that it is found in the margin, begets the suspicion that it was an after-thought, a suspicion entitled to serious consideration, under a statute so penal in its character. This, however, was not the only circumstance impeaching its integrity. It was proved by the second mate that the entry was not in the handwriting of the mate, by whom the entries in the body of the log were made, and the witness swore also to interpolations in the entry of the day previous, which were not in the mate's handwriting, and were not there when the witness saw him make that entry. This was sufficient to justify the rejection of the log-book as evidence, under the statute, of the fact of desertion, the integrity of the only material entry in it, that could make it evidence under the statute, having been impeached by the testimony of a witness who, on that point, was not contradicted, and whose statement was supported by the suspicious character of the entry itself. If it was insufficient to prove a forfeiture of wages under the statute, the entries in it furnished no evidence of desertion under the general maritime law, for entry in the log-book is evidence only in the case in which the statute makes it so. An entry in the log-book has been received as evidence in certain cases, as when it has been referred to in a deposition affirming the truth of the entries in it. *Falconer v. Hanson* (1 Camp. 171), and in a *Nisi Prius* case,

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*D'Israeli v. Jowet* (1 Esp. 427), it was admitted, though under a doubt, to show the time of the sailing of the vessel, but the general rule now is, that the log-book is not evidence *per se* of the facts contained in it, but is mere hearsay. It is not under oath, does not import legal verity, and parties cannot create evidence for themselves by making entries in it. *United States v. Gilbert*, 2 Sumn. 77; *United States v. Sharp*, 1 Pet. C. C. R. 118. Nothing, therefore, contained in the log book could be received to show a desertion under the statute, or a general maritime desertion; or, if it was receivable for either purpose, the justice was warranted in finding upon the other testimony, that the seamen had not deserted. The witnesses on the part of the plaintiff swore that the men having complained to the captain that they were unable to work further, he told them that he would see the consul. He did so, and brought the consul on board, who, after hearing the complaint of the men, ordered them to go ashore and that he would find them a boarding-house, to which the captain expressed no dissent, but, on the contrary, told them that the consul had all to do with it. There was some slight conflict of testimony on that point, but, as respects that, the finding of the justice was conclusive.

The judgment should be affirmed.

INGRAHAM, FIRST JUDGE.—I do not deem it necessary, to the decision of this case, to examine into the propriety of the rule that "freight is the mother of wages," or to express any opinion thereon. Taking it for granted that the rule is a proper one, and is the law within this state, I think there is, in the evidence in the cause, enough upon this point to entitle the plaintiffs to a judgment.

The evidence shows the arrival of the vessel, with her cargo, at Pernambuco, where she was condemned and the cargo re- shipped for the port of destination by the captain. So far as transporting the cargo to Pernambuco, on the passage homeward, was performed, a rateable proportion of freight was earned; and if the cost of transportation from Pernambuco to the port

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of destination had been at the same rate as that originally agreed upon between the parties, there can be no doubt that the plaintiff would have been entitled to his wages up to the time of the condemnation of the vessel.

But it is contended by the defendants that, inasmuch as the cost of transportation from Pernambuco exceeded the whole amount of freight agreed upon for the whole voyage, therefore the ship earned nothing, and the seamen were not entitled to their wages. To this position I cannot give my assent.

If any portion of freight is earned, whether it be large or small, the whole wages which are deemed to have been earned are to be paid without deduction (*Pittman v. Hooper*, 3 Sumner R. 50); and it is a matter of no consequence whether, in balancing accounts, the result will be a profit or a loss. Various causes might operate to make the voyage unprofitable. Capture and detention by an enemy, and a subsequent release, might entirely destroy the profit on the voyage, and yet the seamen would be entitled to their wages; or delay by head-winds, accident at sea, or various other causes might increase the expenses above the freight to be received—still the wages would be recoverable.

There is also another reason, in this case, why wages should be paid. There is no doubt, under our law, that the master was not only justifiable, but that it was his duty, in a case of necessity, to tranship the goods and send them home by another vessel (*Shipton v. Thornton*, 9 Adolph. & Ellis, 814; 3 Kent's Com. 212); and where such transhipment is necessary, he may charge the cargo with the extra freight of such renewed voyage. By the extra freight is meant the surplus beyond what the freight would have been if no necessity of hiring another ship had intervened. *Searle v. Scovill*, 4 John. Ch. R. 218; *Curtiss' Rights and Duties of Merchant Seamen*, p. 220.

If the cargo can thus be charged with the extra freight incurred by the reshipment, then the freight originally agreed upon is earned in part by the ship first employed, and in part by that to which the cargo has been transferred; and it

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follows, of course, that freight has been earned by the transportation of the cargo, and the seamen are entitled to their wages. Nor is there any hardship in this rule upon the owner either of ship or cargo. As to the owners of the ship, the reason of the rule which deprives the seamen of their wages, if the vessel is lost, ceases. By their exertion, both vessel and cargo have been saved and brought into port; and as to the increased expense on the cargo, the owner is protected by his insurance, such increase of freight being recoverable from the insurer. *Mumford v. Commercial Ins. Co.* 5 J. R. 262; *Ogden v. General Mutual Insurance Co.*, 2 Duer, 204.

There was no error in receiving evidence to contradict the entry in the log book. If the entry was *prima facie* evidence, it was open to explanation or contradiction; and after the admission of evidence for that purpose, the justice had to decide upon the truth of the entry, and with his decision we do not interfere.

The receipt, even in its terms, was not conclusive upon the seaman as to his claim for the balance of his wages. It only purported to be for his share of the proceeds of the sale of the vessel. Besides, the receipts appear to have been signed under a threat from the consul that, if not signed, they should receive nothing. We have heretofore held, that a receipt in full, signed by a seaman under such circumstances, was obtained by compulsion, and was not sufficient to deprive the seaman of any right to which he was otherwise entitled.

WOODRUFF, J., concurred.

Judgment affirmed.

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These conclusions applied to all the cases, but, as different questions arose in some of them, they were passed upon separately, and as follows:

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The case of *THOMPSON v. THE SAME* presented nothing different, and the judgment was affirmed.

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*In BURBANK v. THE SAME.*

It appeared that, in adjusting the amount due the plaintiff, the \$40 advance money was allowed and the \$40 received at Callao. There was no evidence that he received \$75 at Callao. The judgment was affirmed.

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*In BEALS v. THE SAME.*

It appeared that the plaintiff received his proportion of the ~~net~~ proceeds derived from the sale of the vessel and gave his receipt for it. The receipt showed that he received the same amount as Wallace, \$158. The rate of wages and the time of service in both cases were the same. Beals, however, received but \$20 advance and Wallace \$40, which may make a difference. It was *held* by the court; that if the plaintiff reduced his judgment less the amount received by him, as disclosed by his receipt, and made his election in ten days, the judgment should be affirmed for that amount, if not, it was to be reversed.

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*In COLEMAN v. THE SAME.*

It appeared that the defendants offered to show a general maritime desertion on the part of the plaintiff, to which he objected, on the ground that the log-book was the only legal evidence of desertion, and the objection was sustained by the court. It was *held* by the court; that this was erroneous. Where the owner means to insist upon a forfeiture of wages, upon the ground of desertion under the statute, it must appear that a proper entry was made in the log-book on the day when the seaman deserted, which is essential to work a forfeiture by virtue of the statute. Proof, therefore, of an entry, that the seaman left the vessel without leave, purporting to have been made on the day he left, is the proper legal evidence to offer,

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and which must be presented, on the part of the owner, in such a case. But when the owner means to rely upon a general maritime desertion and not a desertion under the statute, which is an absence for forty-eight hours without leave, he is not bound to show the desertion by the log-book. It may be proved the same as any other fact, by the testimony of witnesses. Here the defendants offered to prove, in the broadest terms, that the plaintiff deserted, left, and abandoned the vessel, which they had an undoubted right to do. There are other objections to the judgment, but the error is sufficient to entitle the defendants to have it reversed.

In HALL *v.* THE SAME.

It was held by the court; that the printed volume of the laws of California was admissible. (Code, § 426), and the reading of the statute of that state, regulating the rate of interest there, was wholly immaterial, as the justice has returned that interest was allowed according to the laws of this state. The certificate of the consul was merely that Hall and the other seamen named in it were discharged upon receiving their proportion of the net proceeds arising from the sale of the vessel. This had no effect upon their claim for the amount remaining due to them. The amount received by Hall, from the proceeds of this sale, does not appear to have been deducted, but wages were allowed him for the whole time he was employed on board the vessel. It does not appear whether, as in Coleman's case, any allowance was made for the expense of the journey home. He was entitled to a reasonable sum out of the proceeds of the vessel, for that purpose *The Dawn* (*supra*), and the amount he received beyond that was a payment in part of the wages due at the time of his discharge. As we cannot adjust the account upon the facts before us upon appeal, or determine the true amount, the judgment must be affirmed. No desertion was shown in the case.

In *STEWART v. THE SAME* and *GRAY v. THE SAME*, the following opinions were delivered:

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**INGRAHAM, FIRST JUDGE.**—In these cases the log-book was read in evidence by stipulation between the parties, and by it the plaintiffs were shown to have deserted from the vessel. No evidence to contradict or explain this evidence was offered, and, notwithstanding such proof, the court below rendered judgment for the seamen's wages. In this, I think, there was error.

The log-book was *prima facie* evidence sufficient either to forfeit three days' pay or all previous wages, according to the length of absence, and where it was under a stipulation that it should be received in evidence, it appears to me that the plaintiff is concluded by it, if he does not by any other evidence invalidate or contradict the entry.

As to the other grounds of appeal, we refer to the opinions delivered in *Worth v. Mumford et al.*, this term.

WOODRUFF, J. concurred.

**DALY, J.**—In each of these cases, a stipulation was entered into, that the log-book might be given in evidence, and as no evidence was offered impeaching it, it is insisted that it furnished sufficient proof of a general maritime desertion. The stipulation does not express what effect the log-book shall have as an instrument of evidence. It does not provide that it shall be received as evidence of the facts recorded in it, the same as if these facts had been proved by competent testimony, and the only legal effect of it, as an instrument of evidence, is, that it proves that certain entries were made in it, declaring that these plaintiffs left the vessel without leave, and, as these declarations were not made under oath in a judicial proceeding, they are nothing more than hearsay. Hearsay, when it is admitted without objection and no evidence is given contradicting it, may be sufficient to establish the existence of the fact. It is to be presumed, where a party allows a fact to be proved by such imperfect testimony and gives no evidence to contradict it, that he admits the existence of the fact; but I should be unwilling to hold that the plaintiffs, by allowing the log-book to be used in

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evidence, meant thereby that it might be received as evidence of a general maritime desertion, or that they meant anything more, or that the stipulation had any greater effect, than that the defendants might show by it, if they could, that the statute had been complied with. I think it would be carrying the stipulation too far, to hold that it allows the defendants to use the log-book as hearsay evidence of general maritime desertion, that the plaintiffs intended, or should be held to have intended, that evidence, so intrinsically weak, so susceptible of fraud, to which neither the test of an oath nor of a cross-examination had been applied, might be received as sufficient and satisfactory evidence against them, of their desertion. It would be admitting away their whole case, acknowledging that they had forfeited their wages, and I think we should not give the stipulation so extended an effect.

But the \$40 received at Callao does not appear to have been allowed to the defendants. The plaintiffs should therefore be compelled to reduce their judgment less than that amount, and make their election in five days, or the judgment should be affirmed.

## GEORGE W. SHANNON v. JOHN BURR.

The landlord has no right to enter upon his tenant's premises during the term of the lease without the tenant's consent, although the tenant has removed from the premises and is not in actual possession of them, no right of entry being reserved in the lease.

Such an entry upon the tenant's premises is a trespass, and the landlord is liable in an action by the tenant for damages therefor.

But, the tenant having removed from the premises, there being no evidence of actual damage, and no circumstances from which improper motives on the part of the landlord could be presumed; *held*, that the tenant was only entitled to nominal damages.

For a trespass committed under an honest mistake, without intent to injure, the amount of damages recoverable should be confined strictly to the injuries sustained.

**APPEAL** by defendant from a judgment of the fifth district

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court. This action was brought to recover damages for trespass. The facts sufficiently appear in the opinion of the court.

*Hoyt and McIntire*, for the appellant.

*C. Kessler Smith*, for the respondent.

**INGRAHAM, FIRST JUDGE.**—The defendant was the landlord of certain premises which he rented to the plaintiff, and received the rent to the 1st May. The plaintiff removed from the premises before the term expired and locked them up. On the 28th April and on the 1st of May the defendant obtained the key from a third person and entered the premises, but no damage was shown to have been sustained by the plaintiff, nor was any evidence given on that subject. The justice rendered judgment for the plaintiff for \$15.00 damages.

There can be no doubt that the plaintiff was entitled to judgment. The entry by the defendant upon the premises of the plaintiff was an unlawful entry. He had no more right than any stranger, prior to the expiration of the term, to go into the premises in the mode in which he entered. The landlord has no right upon his tenant's premises during the term, without the tenant's consent, unless such right of entry is reserved in the letting.

Every unlawful entry upon the premises of another is a trespass, and, whether the owner suffer much or little, he is entitled to recover some damages. *Dixon v. Clow*, 24 Wend. 188. See also various cases cited in Sedgwick on Damages, p. 133, *et seq.*; *Parker v. Griswold*, 17 Conn. 283; *Blake v. Jerome*, 14 J. R. 406; 6 J. R. p. 5. But in this action the plaintiff is not entitled to recover more than nominal damages, without evidence of actual damage being sustained. The premises were empty, the plaintiff having removed all his property therefrom. No injury appears to have been sustained by the entry, and there is nothing from which improper motives may be presumed on the part of the defendant, other than the mere unlawfulness of the entry. In such a case, the plaintiff should only have recovered nominal

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damages. *Pastorius v. Fisher*, 1 Rawle, 27; *Lamb v. Priest*, Jan. Gen. Term Com. Pleas, 1852.

The rule governing this and kindred cases is stated by Judge Woodruff in *Ives v. Humphreys* (1 E. D. Smith, p. 202). For a trespass committed under an honest mistake, without intent to injure, the damages should be strictly confined to compensation for the injury sustained by the plaintiff. *Walrath v. Redfield*, 11 Barb. 373.

If the tenant had been evicted from the premises, the damages could not have exceeded the value of the premises during the eviction, and where it does not appear that there was any bad motive imputable to the defendant or any injury sustained in consequence of the entry on the plaintiff's premises, I think damages beyond the actual injury ought not to have been awarded.

The judgment should be reduced, by limiting the damages to six cents, and affirmed for that sum and the costs of the court below, and reversed as to the residue, without costs of appeal to either party

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#### OAKLEY BEACH v. JOHN OLLENDORF.

When the creditors of a debtor have signed a composition deed, every agreement, securing an advantage to one of them withheld from the others, is void. Nor in such a case is it necessary to show an execution of the compromise deed by all the creditors. A fraud upon any one of them is sufficient to invalidate the agreement.

A composition deed, though under seal, if executed by one of the partners in the firm name, is binding upon the partnership.

**APPEAL** by defendant from a judgment of the Marine Court. This was an action upon a promissory note. The defence was, that the note was given to induce a firm, of which the plaintiff was a member, to sign a compromise agreement, releasing the defendant from his indebtedness to his various creditors; that it

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was given without the knowledge or consent of the other creditors and was therefore void. Upon the trial, the defendant introduced a compromise agreement under seal, purporting to have been executed by the various creditors of the defendant. He proved its execution by one of the creditors and also the firm of Beach, Case & Company, of which firm the plaintiff was a member. The signature was the firm name and made by the plaintiff, not by the partners individually. The note in suit was given to the firm to induce them to sign this compromise deed, and was passed by the firm to the present plaintiff. The compromise was then offered in evidence, but was objected to by the plaintiff's counsel, upon the grounds that it did not appear that the plaintiff was authorized to execute an agreement under seal for the firm; nor did it appear that the release was executed by the other creditors. The objection was sustained, the compromise excluded, and judgment was rendered for the plaintiff.

*Tyler and Brown*, for the appellants.

*Nathan Comstock*, for the respondent.

BRADY, J.—The note in suit was given by defendant to plaintiff, as one of the firm of Beach, Case & Co., in addition to twenty per cent. in cash, which the creditors of the defendant had agreed to accept in full discharge of their debts and as a condition of that firm uniting in the composition deed, which they did. It was also agreed, at the time the note was given, that it was to be kept secret from the other creditors. There can be no doubt that where the creditors of a debtor have signed a composition deed, every agreement securing an advantage to any one of them, withheld from the others, is a fraud upon them and void. *Beck v. Coll*, 4 Sand. S. C. R. 79, and cases cited.

The composition deed was proved by the witness, Case, to have been signed by the plaintiff on behalf of the firm, with au-

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thority so to do, and such act was subsequently ratified by Case as one of the firm. Even if such ratification had not occurred, the act of the plaintiff would be binding on his copartners. It created no obligation and incurred no liability. It was the sale or compromise of a debt which one partner may make under seal. It was not necessary to prove the signatures of all the persons appended to the composition deed, a fraud upon any one of them was sufficient to invalidate the note. The witness Gay proved the signature of John Caswell & Co., Gregory & Co., and Balen & Co., and the deed should, when offered, have been received in evidence. The justice erred in this respect and the judgment must be reversed.

Judgment reversed.

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**GERARDUS DE FOREST v. GEORGE C. BYRNE.**

A recital in a lease, of the purposes for which demised premises are let, constitutes an express covenant on the part of the tenant to use them for no other purpose. Thus, the lease reciting that the landlord let the premises to the tenant "to be occupied as a lumber yard," *held*, that this constituted an express covenant, on the part of the tenant, to occupy them for that purpose, and that the erection of buildings thereon, by the tenant's assignee, was a wrongful act.

The assignee of a tenant having devoted the demised premises to a use inconsistent with the tenant's covenant in the lease, in consequence of which the premises became subject to the payment of a tax which constituted a lien upon the land, and the assignee of the tenant having refused to pay the tax upon demand, and the landlord having been obliged to pay it, to prevent the premises from being sold; *held*, that he could recover it in an action against the tenant's assignee.

**APPEAL** by defendant from a judgment of the third district court. This was an action to recover for money paid by the plaintiff to the use of the defendant, under the following circumstances: The plaintiff leased certain premises in West street, New York city, to one J. F. Bridges, for the term of five years; the lease reciting that they were "now occupied by said Bridges as a lumber yard and to be occupied as a lumber yard." This

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lease was afterwards assigned by Bridges to the defendant, who ceased to use the property as a lumber yard and erected five buildings thereupon. In consequence of the erection of these buildings, the lots became subject to the payment of water rates and liable to be sold for the payment thereof, if the rates were not paid. The defendant having refused to pay these rates, the plaintiff, being the owner in fee of the lots, paid them, to prevent the land from being sold for the non-payment, and brought this action against the defendant for the amount. The court rendered judgment for the plaintiff and the defendant appealed.

*Charles S. Jordan, for appellant.*

*F. F. Marbury, for respondent.*

DALY, J.—The premises were demised to Bridges to be occupied as a lumber yard, and the defendant, as the assignee of Bridges, saw fit to devote them to another use, in consequence of which, they became subject to the payment of a certain water tax. This tax was a lien upon the land, and to discharge the lien the plaintiff paid the tax, after it had been demanded of the defendant and he had refused to pay it. I think there can be no doubt of the plaintiff's right to recover it from the defendant.

By the terms of the demise, the plaintiff agreed to let, and the tenant to take, the premises, to be occupied as a lumber yard. This was an express covenant to occupy them as a lumber yard. To constitute an express covenant, no formal, technical, or precise terms are required; but wherever the intent of the parties can be collected out of the deed, for the doing or the not doing a particular thing, that is sufficient to make an express covenant. Platt on Covenant, 27. The intention here is as plain as if the words of the lease were "I covenant and agree to occupy the premises as a lumber yard," and occupying them for another purpose was a breach of the covenant. The case of *Kinney v. Watts* (14 Wend. 38) was very different. There, under a de-

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mise for years, the defendant was sought to be charged upon a covenant for quiet enjoyment. As no such covenant was expressed, it had to be implied as the necessary consequence of the grant of the land, but as no covenant, in a conveyance of real estate, can be implied under the Revised Statutes (1 Rev. Stat. 738), it was held that the plaintiff could not maintain an action of covenant for a disturbance of his possession, though he might have maintained one for the injury done. But here the defendant expressly agreed that the premises should be occupied as a lumber yard; that was a covenant running with the land, and the assignment to the defendant was subject to that covenant. The erection of the buildings, therefore, was a wrongful act, and the defendant having thereby imposed a permanent charge upon the plaintiff's property, which he refused to pay off, the plaintiff was forced to discharge it to release the property, and has a claim against the defendant for restitution.

Judgment affirmed.

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**SIMON WALDHEIM v. MAX SICHEL and another.**

An action for false imprisonment cannot be maintained for an arrest made upon a warrant, granted by a magistrate having jurisdiction, against the parties upon whose complaint the warrant was issued.

In such an action it is improper for the justice to allow an amendment of the complaint by adding a count for malicious prosecution; the plaintiff having rested his case and failed to sustain his action in its original form.

In an action for malicious prosecution, the question of the want of probable cause is purely a question of law, unless there is conflicting testimony as to the facts.

**APPEAL** by defendant from a judgment of the Marine Court. This was an action for false imprisonment. The pleadings were verbal. The evidence for the plaintiff showed that he was arrested upon a warrant issued by a police justice, upon the complaint of the defendants, but was discharged upon their cross-examination. At the close of the plaintiff's case, the counsel

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for the defendant moved to dismiss the complaint on the ground that an action for false imprisonment did not lie; that the plaintiff's remedy, if any, was an action for malicious prosecution. The court denied the motion, but allowed the plaintiff to amend his complaint, by adding a count for malicious prosecution, to which the defendants' counsel excepted. In his charge to the jury, the justice stated that the want of probable cause was a mixed question of law and fact, and left it to the jury to determine whether there was sufficient evidence thereof, to which the defendants' counsel duly excepted. There was a verdict for the plaintiff.

*S. Kaufman*, for the appellants.

*McCunn and Moncrief*, for the respondent.

I. The justices' courts have the same power to order an amendment of the complaint as courts of record. *Fulton v. Heaton*, 1 Barb. 552. The amendment allowed belonged to the same class of cases (torts), and was proper.

II. The existence of probable cause is a mixed question of law and fact; whether the circumstances alleged are true, is a question of fact; if true, whether they amount to probable cause is a question of law. *McCormick v. Sisson*, 7 Cow. 715; *Pangborn v. Bull*, 1 Wend. 345; *Martin v. Deyo*, 2 Wend. 424; *Hall v. Suydam*, 6 Barb. 83.

DALY, J.—The propriety of allowing a plaintiff, even before the day of trial, to change an action for false imprisonment into an action for malicious prosecution, may be very much doubted; but to permit a plaintiff, after he had rested his case and had wholly failed to establish it, to amend his complaint, by substituting an entirely distinct and different cause of action, was to take the defendant completely by surprise. He came into court to defend an action against him for false imprisonment, and all that he was required to show, as a complete answer to it, was, what the plaintiff himself established, that the arrest was made

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upon a warrant granted by a magistrate having jurisdiction. He may have been, and will be presumed to have been, wholly unprepared to answer the charge, that he was actuated by malice in, or that there was a want of probable cause for, preferring the complaint upon which the warrant issued. To require him, without previous notice, to answer or explain the circumstances relied upon, to show the existence of a want of probable cause, was to deprive him of what he was entitled to, time to prepare and get ready for defending himself against an action which he had no right to anticipate. It was taking him by surprise and giving the plaintiff an undue advantage, and generally to allow a plaintiff, after he has failed in his action, to resort to another, by suffering him to amend his complaint on the spot, would ~~in~~ practice be followed by the grossest abuses.

The judge, moreover, erred in telling the jury that the want of probable cause was a mixed question of law and fact. Where there is no dispute as to the facts, which was the case here, it is purely a question of law, upon which the court are bound to instruct the jury positively, and, if they do not follow the instructions they receive, their verdict will be set aside as against evidence. It does not become a mixed question unless there is conflicting testimony as to the facts. *Bulkeley v. Keteltas*, 2 Seld. 384. The judgment must be set aside.

Judgment reversed.

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#### THOMAS FORSTER v. SAMUEL CAPEWELL and another.

Upon an application in the court of Common Pleas to open a default in the Marine Court, the applicant must establish that injustice has been done him by the default. It is not enough that his affidavit shows a defence, if the allegations are denied by the affidavit of the plaintiff. In such cases the appellant must furnish, in addition to his own affidavit, proof by some other person of the truth of his defence.

Whether the failure of the defendant to hear his case called, although he was in attendance at the court room at the time, is a sufficient excuse for the default  
—Query.

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APPEAL by defendants, under section 366 of the Code, from a judgment of the Marine Court by default. The action was upon a promissory note. The excuse set up for the default and the defence sought to be interposed sufficiently appear in the opinion of the court.

*F. H. Hart*, for the appellants.

*Frederick H. B. Bryan*, for the respondent.

INGRAHAM, FIRST JUDGE.—The judgment in the court below was by default, duly taken before the justice who granted the judgment, as appears by the return.

To enable the court to set aside a judgment by default such default must be excused and the defendant must show that injustice has been done him by the judgment.

I doubt very much the sufficiency of the excuse, when the defendant himself states that he was in the court room and did not hear the cause called. The justice returns that it was first called by the clerk and entered in the register, and was afterwards called before the justice. A defendant should at least show sufficient attention to his interests to listen when the justice calls his case on for trial.

But even admitting that the excuse is sufficient, the defendants do not establish that injustice has been done them by the judgment. One of the defendants swears that the note was given for money loaned, and that usury was charged for it. This is denied by the plaintiff. In such cases we require the appellant, in addition to his own affidavit, to furnish proof, by some other person, of the truth of his defence. We cannot say, where the defendant states a fact and the plaintiff denies it, which of the statements is correct; and the only way to establish it is, by the affidavit of the witness, by whom the defendants expect to prove their defence.

The judgment must be affirmed.

## F. C. GOSSLING v. PETER V. BROACH.

The defendant, by pleading to the merits in the Marine Court, waives all defects and irregularities in the summons, although an objection may have been made thereto, prior to joining issue, and reserved to be passed upon at the time of trial. Pleading to the merits waives all matter in abatement of the action.

APPEAL by plaintiff from a judgment of the Marine Court. The facts sufficiently appear in the opinion of the court.

*Frederick Rice*, for the appellant.

*J. Aiken*, for the respondent.

BRADY, J.—The summons in this case commanded the defendant to appear and answer F. C. Gossling & C. Boss, in a plea of value of personal property to their damage, \$500. On the return day, the plaintiff, after amending, by striking out the name of Boss, to which no objection was made, complained that defendant owed her \$42.40 for wrongfully taking some knitting yarn. The defendant objected to the complaint that the summons did not state the cause of action, and that the names of the plaintiffs were not stated in full, and then, without taking any decision upon his objection, answered by a general denial. The action was then adjourned and several adjournments were subsequently made. On the day of trial, the plaintiff called a witness to the stand, and then the defendant's counsel objected to any proceeding on the part of the defendant, until the justice heard and disposed of his application for judgment, by reason of the irregularities in the summons already mentioned. The justice sustained all the objections and gave judgment for the defendant.

This court has held, since the decision of *Lighter v. Haskins* (Nov. G. T. 1851), that pleading to the merits is a waiver of all defects to the form of the summons and all irregularities therein. *Andrews v. Thorp* (1 E. D. Smith, 615), and see *Monteith v. Cash*

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The Sun Mutual Insurance Company v. Dwight.

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id. 413), in which Judge Ingraham says, "We have heretofore held, that where a defendant pleads to the jurisdiction, that is a plea in abatement, and if he wants to have that question reviewed, he cannot plead to the merits."

I have considered the effect of not obtaining from the justice a decision before pleading to the merits, and have come to the conclusion that it was a waiver of the objection, and that the objection was made and allowed too late when presented again to the justice, and decided by him. Besides, there was no plea to the jurisdiction in this case. An objection was made which was not embodied in the answer, and issue having been joined by an answer to the merits, the court should not then have entertained the objection. The judgment is wrong, and must be set aside.

Judgment reversed.

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#### THE SUN MUTUAL INSURANCE COMPANY v. HENRY DWIGHT, Jr.

Where the necessary papers upon the appeal are not submitted to the court, the appeal will be dismissed. So *held*, where the papers did not show whether the appeal was taken from a judgment upon a demurrer or from an order striking out a demurrer as frivolous.

In an action by a corporation it is not necessary to specify by date and title the acts amending the act incorporating them. It is sufficient to designate that act particularly, and to refer generally to the other acts amendatory thereof.

DEMURRER to complaint. This was an action upon a promissory note, made by the defendant to the order of the plaintiffs, and delivered to them by the defendant. The complaint, after setting forth the making and delivery of the note, etc., averred that the plaintiffs were a corporation, incorporated under an act of the legislature of the state of New York, passed May 22d, 1841, and entitled, "An act to incorporate The Sun Mutual Insurance Company," together with the several acts amendatory thereof and the general laws of the said state. The defendant

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demurred, upon the ground that the complaint did not state facts sufficient to constitute a cause of action.

The demurrer was overruled, whether upon argument of the demurrer or upon motion for judgment, on account of its frivolousness, did not appear by the papers before the court. The defendant appealed.

*C. N. Potter*, for the appellant.

*Henry P. Fessenden*, for the respondent.

INGRAHAM, FIRST JUDGE.—I am at a loss, from the papers submitted on this appeal, to say whether the same is from the decision on a motion to strike out the demurrer as frivolous, or from a decision upon the argument of the demurrer. The appellant should see that the papers necessary on the appeal should be submitted to the court. If he neglects to do so, he has no cause to complain if his appeal is dismissed.

Upon the merits, I think, the demurrer cannot be sustained. The complaint alleges the making and delivery to the plaintiffs of the note in suit; that the same was not paid at maturity nor since that time; that the plaintiffs are a corporation under a statute which is designated particularly, and other amendatory acts.

These facts are all admitted by the demurrer, which alleges, for cause of demurrer, that the above does not constitute a cause of action.

Nothing more would be necessary, to maintain the plaintiffs' case before a jury, than the proof of such facts. The omission to set out the amendatory acts is not material. A reference to the first act shows the plaintiffs to be a corporation, and the residue may be considered as surplusage.

I rather think this is not a ground of demurrer, by the code. There is no defect in stating a sufficient cause of action, and for anything beyond that, instead of demurring, the defendant should move to have the complaint made more specific. If no act of incorporation had been stated, the result might be otherwise.

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Seaman *v.* Ward.

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I have expressed an opinion upon the merits against the appeal, but, for the reason first stated, the appeal must be dismissed with costs.

Appeal dismissed.

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### DAVID SEAMAN *v.* SYLVANUS S. WARD.

A judgment of nonsuit is no bar to another action for the same cause, although evidence upon both sides has been adduced, and the cause has been regularly submitted to the justice by both parties for decision, if a motion for nonsuit has been made and the decision thereon has been reserved.

The judgment of the justice must be declared by some official act within four days after the trial. It is not enough that it is decided in his own mind.

In order to maintain an action for use and occupation, there must be evidence of an actual and continual occupation during the whole period for which the party is allowed to recover.

The delivery and acceptance of the key of the leased premises is sufficient to establish the fact of occupation, which will be presumed to continue until an interruption thereof is shown. (a)

APPEAL by plaintiff from a judgment of the Marine Court. This was an action for use and occupation and in which the complaint was dismissed in the court below. The facts sufficiently appear in the opinion of the court.

*William H. Van Cull*, for the appellant.

*Hoffman & Pirsson*, for the respondent.

DALY, J.—The judgment in the former action was no bar. If no motion for a nonsuit is made, but the case is submitted to the justice by both parties for decision, he cannot render judgment of nonsuit; and if he enters such a judgment, it will be deemed and taken to be a judgment for the defendant. In this case, a motion for nonsuit was made, but the decision was reserved. It was, therefore, competent for the justice to give

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(a) See *Tattersall v. Hass*, *post*, p. 56.

## Seaman v. Ward.

judgment of nonsuit. The judgment, however, was of no effect. It was not rendered within four days after the trial. It was admitted, on the trial, that Justice McCarthy rendered judgment, *in his mind*, within the four days, though it was not entered until afterwards. There is no such thing as a judgment rendered in the mind of the justice. Judgment is a judicial act, not a mental resolution. It is not enough that the judge concludes to render judgment; he must declare it. He must declare it by an official act, such as endorsing an entry or minute of his decision upon the process returned before him, from which the clerk docketes or registers the judgment, as it has been rendered by the justice (2 Rev. Law, p. 383, § 110, p. 387, 123; *Figaniere v. Jackson*, 2 Abbott, 287).

The plaintiff established sufficient to entitle him to recover for use and occupation. He proved that his agent, Loyd, made a verbal agreement with the defendant for the renting of the premises; that Loyd rented them to the defendant from October until May, 1855, and he proyed admissions made by the defendant in the middle of October, to the effect that he had hired the house and paid a big rent. The house was to be put in good order. Ward, the defendant, objected that it was not in order, and then saw Seaman, the plaintiff, who agreed to put it in order. The keys were delivered to Ward by the mechanic employed by the plaintiff to repair the house and put it in order. He fitted the keys throughout the house, according to Ward's directions. The repairs were made under Ward's direction, and, by the mechanic's testimony, to Ward's satisfaction. Mrs. Ward gave directions where she would have some wash-basins placed, Ward being present, and her directions were complied with. The walls were first whitened, but the whitening rubbed off, and Ward objected. Subsequently the plaintiff agreed to paint the walls. They were accordingly painted, but Ward objected that the painting had not been well done and that the house was out of order. It was shown by two witnesses that the painting throughout was well done, and by another witness that Ward gave directions how the painting was to be done, and they

## Seaman v. Ward.

were complied with. He pointed out to the witness some places that wanted to be touched up, and they were touched up according to his directions. While the house was being repaired, Ward sent women to clean it. They were engaged in cleaning it about the 20th of October. He also told the plaintiff's agent, Loyd, either that he had or was going to send a ton of coal to the house, and the witness saw a load of coal there the latter part of October, about the time when Ward's employees were engaged in cleaning. When the repairing was done, Seaman brought an agreement in writing, but Ward refused to sign it, declaring that the house was not in the order it was to be put in. Seaman contended that the house was let, but Ward declared that "it ~~was~~ not put in such order as agreed to by Seaman, and he would not take it." After that neither party would acknowledge that he had anything to do with the house, and the agent, Loyd, upon his own responsibility and without the authority of either, let the house to another tenant. When this tenant went into possession did not appear, but the house was rented to him by Loyd about a month after Seaman presented the written agreement to Ward and Ward refused to sign it. It further appeared that Ward objected to the neighborhood and to the walls being rough, and Loyd heard Mrs. Ward say that she did not like the neighborhood.

Under the English statute of 11 Geo. II, chap. 19, § 14, and the former statute of this state, which was substantially the same, it has been repeatedly held, that where the tenant has entered into an agreement to take the premises for a definite period and has acquired thereby the legal right to the possession, that he is liable in an action for use and occupation for the whole period agreed upon, whether he actually occupies or not. *Whitehead v. Clifford*, 5 Taun., 518; *Gibson v. Conthorpe*, 1 Dowl. & Ryl. 205; *Baker v. Holtzfoli*, 4 Taun. 45; *Izon v. Gorton*, 5 Bing. N. C. 501; *Teneir v. Judson*, 6 Bing. 206; *Little v. Martin*, 3 Wend. 219. In *Wooley v. Walling* (7 C. & P. 610), it was held, that where the agreement is to let from a future time, there must be an entry and some occupation under it, though in that case

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it was said that if the letting was immediate it might be different; and in *Jones v. Reynolds* (id. 835), it was intimated that a taking of possession was at least essential to charge a tenant for use and occupation under the agreement, and this appears to be the present English doctrine. *Edge v. Stafford*, 1 Crompt. & Mees. 391; *How v. Kennet*, 3 A. & E. 659; *Sullivan v. Jones*, 3 Car. & Payne, 579; *Nation v. Tozer*, 1 Cr. Mees. & R. 172.

The words of the English statute are, the landlord may recover a reasonable *compensation* for the lands, &c., *held* or occupied. Under this statute, where the tenant acquires by the agreement the legal right to the possession, the premises may be said to be *held* by him within the terms of the statute, whether he continues to occupy or not, for the legal right to the occupation is in him and not in the landlord. But the Revised Statutes (1 R. S. 748, § 26) have made a material alteration in this phraseology. As the statute now stands, the landlord is to recover "a reasonable *satisfaction* for the *use* and occupation," and I am disposed to think that the construction put upon this amended phraseology by Justice Beardsley, in *Wood v. Wilcox* (1 Denio, 87), that there must be actual and continual occupation during the whole period for which the party is allowed to recover, is the correct one.

If this be so, then, the question in the case is, did the defendant actually occupy the house, and, if he did, how long did that occupation continue? The delivery and acceptance of the key of the house is sufficient to establish the fact of occupation. *Little v. Martin*, 3 Wend. 221; *Noble v. Smith*, 2 Johns. 56; Taylor's Land. & Tenant, ed. of 1844, p. 299. In addition to which, there was evidence showing that Ward entered and cleaned the house and sent a quantity of coal there. That was abundant evidence of the commencement of an occupation, and, as the commencement of an occupation was shown, it will be presumed to have continued in accordance with the agreement, until the contrary appears. It was shown that it was interrupted and put an end to, by Loyd's leasing the premises to another tenant. When he began to occupy, the occupation of the de-

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fendant ceased, but up to that time the defendant was liable in the action and the plaintiff entitled to a reasonable satisfaction for the use and enjoyment of the premises by the defendant. It was agreed that it was worth a rent of \$1,000 a year, and it appeared from the evidence that it was afterwards leased for that sum. There was nothing in the evidence to warrant the judge in finding that there was, as has been insisted upon on the appeal, a surrender and acceptance of the premises by the plaintiff. The judgment must be reversed.

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WILLIAM H. TATTERSALL v. RICHARD HASS.

The refusal of a justice to allow an amendment of a pleading, if in any case a ground of appeal, can only be so when no injustice would result from granting the application. Where a motion was made upon the trial to amend an answer, so as to add a new defence; *held*, that it was properly refused by the justice. Objection to questions as leading should specify the ground of the objection, so that the form of the question may be altered accordingly—otherwise the objection will not be considered upon appeal. A judgment of nonsuit is no bar to another action for the same cause, where the nonsuit was granted because the plaintiff's evidence failed to make out a case. (a)

APPEAL by defendant from a judgment of the Fourth District Court. This action was for rent. The answer contained a denial of the allegations in the complaint and a plea of prior adjudication. Upon the day to which the trial was adjourned, after joining issue, the defendant moved to amend his answer, by inserting an allegation that the leased premises became untenanted by the negligence of the landlord. The motion was denied and the defendant excepted. Upon the trial several questions were asked, to which a merely general objection was interposed, the admission of which the appellant contended was erroneous,

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(a) See *Seaman v. Ward*, ante, p. 52.

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upon the ground that they were leading. The plaintiff read in evidence, subject to objection, a written agreement of hiring between the parties for the previous year, and called a witness who testified to a verbal agreement for the present year upon the same terms. The defendant, to sustain his plea of prior adjudication, showed that a suit was brought against him by the assignor of the present plaintiff for the same cause of action, in the Fifth District Court, in which judgment of nonsuit was rendered upon the close of the plaintiff's case. The defendant also offered to show that the leased premises became untenantable through the negligence of the landlord. The evidence was objected to and excluded. Judgment was rendered for the plaintiff.

*J. Ailken*, for the appellant.

*John Anderson, Jr.*, for the respondent.

**INGRAHAM, FIRST JUDGE.**—The court below properly refused to allow the amendment of the answer. The plaintiff had brought his case on for trial, and the defendant then asked to amend the answer, by setting up a defence of which no notice had been given and which the plaintiff could not be expected to be prepared for with evidence. If the refusal of the justice to allow an amendment of pleadings is in any case ground of appeal, it can only be so when no injustice would result from granting the application. The defence proposed to be added by amendment was not one of which the tenant could take advantage, because no agreement to repair appears in the agreement of hiring. If the amendment was properly denied, the evidence offered to sustain the defence sought to be introduced thereby was properly excluded.

It would be idle to say that the court ought to have admitted evidence to prove a defence which it had refused the defendant leave to insert in his answer.

It was a question of fact for the court to decide for how long

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a time the premises were hired. The evidence was contradictory and his decision was final.

No objection was made to any question put to Foster, on the ground that the question was leading. We have held it to be necessary that the ground of objection in such a case should be stated so that the question may be correctly put to the witness. In other respects the questions were not objectionable.

The written agreement was properly admitted in evidence, to show the terms of the subsequent hiring. That was on the same terms as for the previous year, and a reference to the agreement for the prior year was necessary, to ascertain the terms.

The suit previously brought in the Fifth District Court was no bar to another suit, because in that suit a judgment of nonsuit was granted. Such a judgment is no bar to another action for the same cause. Where a judgment of nonsuit has been rendered by the court, instead of deciding finally between the parties, it has been held that such a judgment might be set up in bar of another suit; but that rule is not applicable to a case where the nonsuit was granted for want of evidence on the part of the plaintiff to make out his case. Such appears to have been the result in the cause referred to, and did not prevent the present action. There is no ground for reversing the judgment.

Judgment affirmed.

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#### DANIEL GRIFFIN v. SHEPHERD C. KEITH.

The defendant's admission, that he had had certain goods, is sufficient evidence of delivery to maintain an action for the sale and delivery of the goods, although it appears that they were in fact delivered to some other person.

In an action for goods sold and delivered, it appeared that the goods were delivered to one B. K., upon the agreement that he should sell them as the accredited agent of the plaintiff, and return to him the goods unsold. The goods, however, were charged by the plaintiff, in his books, to the defendant, S. K. The plaintiff testified they were sold exclusively upon his credit. The bill was made out in his

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name, and was presented to and admitted by him, and he agreed to return the unsold goods within a specified time, which agreement was not fulfilled. *Held*, sufficient to sustain a recovery against him as principal debtor.

**APPEAL** by defendant from a judgment of the Marine Court. This was an action for goods sold and delivered. They were delivered to the brother of the defendant, but were charged to the defendant himself, the agreement between the parties being that the goods which were sold by the defendant's brother were to be paid for and the others were to be returned. It appeared by the testimony of one of the plaintiff's witnesses, that the defendant acknowledged that he had the goods in question, although it also appeared, by the cross-examination of the same witness, that the goods were in point of fact delivered to the brother. The defendant moved for a dismissal of the complaint, upon the ground: 1. That there was no evidence of a delivery of any of the goods to the defendant; and, 2. That there was no evidence of any written agreement of guaranty by the defendant, who, if liable at all, was only liable as guarantor. The motion was denied and judgment was rendered for the plaintiff. The evidence in the case, relating to the question of the defendant's indebtedness, sufficiently appears in the opinion of the court.

*W. Romaine*, for the appellant.

*Niles and Bugley*, for the respondent.

**DALY, J.**—The witness, Gleason, proved that the defendant acknowledged that he had the goods enumerated in the bill that was given in evidence. This rendered it unnecessary to prove that they had been delivered. He also proved that the prices charged in the bill were fair and reasonable. This was sufficient to entitle the plaintiff to maintain the action, and the motion for a dismissal of the complaint was properly denied.

It appeared that such portion of the goods as were not sold were to be returned, and that the plaintiff demanded the return of such as were not sold, and that Keith promised to return

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them by the 1st of February, 1855; but it did not appear that any part of them had been returned: presumptively, therefore, the defendant, after the request made of him, was liable for the whole amount he had received.

There was nothing to show that the defendant's engagement was collateral, and that his brother was the principal debtor. The goods were charged, upon the plaintiff's books, to the defendant, except the item of November 4th (\$45.18), which the justice appears to have disallowed; and the plaintiff swore that he never looked to Bezar Keith for payment, but to the defendant, and that he sold the goods on the credit and responsibility of the defendant; in corroboration of which, Gleason swore that the plaintiff said to the defendant, in the witness's presence, in a conversation respecting the gauges, which the defendant's brother had got: "You know it was on your own responsibility;" and that in the early part of January, 1855, the defendant admitted to the plaintiff, that the bill, which was made out, charging him with the goods, was correct. One witness swore, that the plaintiff said, when he was making arrangements for the sale of the gauges, that B. Keith was going to sell them as his agent, and that defendant would be responsible for them; and another witness testified, that he had heard the plaintiff say that he had a man selling these gauges. But this was not necessarily inconsistent with the truth of what had been sworn to by the other witnesses. It might be to the interest of all parties, that B. Keith should offer these articles for sale, as the accredited agent of the plaintiff. The conditions of sale, that they were not to be paid for unless sold, but if unsold were to be returned to the plaintiff, the whole or any part of them, rendered him in a certain sense but a kind of agent for their sale. The plaintiff, therefore, might very well say that B. Keith was to sell them as his agent, or that he had a man selling these gauges, as he had agreed, if they were not sold, to take them back again. He demanded their return or the return of what had not been sold, and the suit was not commenced until a month after the time when the defendant had promised to return what had not been sold. The defendant

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had named his own time, and the plaintiff, after waiting a month beyond that time, was entitled to treat the sale as absolute, and insist upon payment. The judgment should be affirmed.

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### JAMES B. BRADY v. JULIUS PEIPER.

In an action against a surety upon a lease, it is not competent for the defendant to show a verbal agreement, cotemporaneous with the execution of the lease, that it might be surrendered at the will of the tenant, and that such surrender should operate as a discharge of the surety, and a remission of three months' prior rent. But it seems, that a surrender by the tenant and an acceptance by the landlord of the leased premises, would operate as a release to the surety, in respect to all subsequently accruing rent.

APPEAL by the defendant from a judgment of the Marine Court. This action was brought against the defendant as surety upon a lease. Both the lease and the guaranty were in writing, the lease being for two years. Upon the trial, the defendant offered to prove, that the plaintiff agreed verbally, at the time of the execution of the lease and guaranty, that the tenant might surrender the premises whenever he should wish to do so; that such surrender should discharge the surety, and that the plaintiff should remit three months' rent previous to such surrender. The evidence was excluded by the court, and, there being no other evidence offered, judgment was given for the plaintiff.

*Lawton and Larned*, for the appellant. The offer made constitutes a complete defence to this action. It was an independent verbal agreement. It does not alter the contract on which this action was brought, but only provides a method by which, in a certain contingency, it should be discharged. 3 Cowen & Hill's Notes, 1461; *Bradley v. Bentley*, 8 Vermont R. 243; *Crossman v. Fuller*, 17 Pick. 171, 174; *Huin v. Kalback*, 14 Serg. & Rawle, 159; *Batterman v. Pierce*, 3 Hill, 171.

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*Frederick Smyth*, for the respondent.

BRADY, J.—The offer of the defendant in this action was an offer to show, by the witness, that the lease, though in terms for a period of two years, was, by a verbal assurance on the part of the lessor and plaintiff, a lease at the will of the tenant, to be surrendered by him at any time, and such surrender was to operate as a discharge of the defendant, who was his surety, and of his own covenants. The justice was right in excluding the evidence. It operated to change the character and effect of the covenants contained in the lease, by a prior parol agreement, and was not admissible on any principle of evidence. 1 Greenleaf, 360, § 275, and sequel; *Cleves v. Willoughby*, 7 Hill, 83; ~~Spckels v. Sax~~, 1 E. D. Smith, 253. If the offer had been to show the surrender and the acceptance of the premises by the landlord, as a bar to subsequently accruing rent, it would have been a good defence, and would have operated as a release to tenant and surety.

Judgment affirmed.

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**ALEXANDER DENNISTOUN and others v. THE NEW YORK AND NEW HAVEN R. R. CO.**

To entitle the defendant, in an action brought in this court, to an order removing it into the Circuit Court of the United States, it must appear that he is an alien or a citizen of another state, and that the action is brought by a citizen of this state.

And he is not entitled to such an order if he is a citizen of another state, unless all the plaintiffs are severally citizens of this state.

In an action brought by four plaintiffs, three of whom were aliens and one a citizen of this state, against a railroad corporation created by the laws of another state: held, that an application to remove the action into the United States Circuit Court was properly denied.

Such a corporation is, within the meaning of the Judiciary Act of 1789, a citizen of the state incorporating it, notwithstanding, by a law of this state, it has been authorized to continue and construct its road through and over a part of this state, with liberty to purchase and hold real property here for such purpose.

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MOTION to remove cause into the Circuit Court of the United States. The facts sufficiently appear in the opinion of the court at special term, which was as follows:

DALY, J.—This is an application on the part of the defendants for an order directing this cause to be removed to the United States Circuit Court for the district.

The petition alleges that the defendants are a corporation created and existing under a law of the state of Connecticut, in which state the railroad is in part situated and their business carried on; and that such corporation is, within the twelfth section of the Judiciary Act of the United States, a citizen of the state of Connecticut; and they further allege, upon information and belief, that the plaintiffs are citizens and residents of the state of New York.

In answer to the application, the plaintiffs set up and show by affidavit, that three of the plaintiffs, Alexander Dennistoun, John Dennistoun and William Cross, are aliens, being subjects of the Queen of Great Britain, in which kingdom they now reside; and they further show that the summons and complaint in this action was served, in conformity with a statute of this state, authorizing the defendants to continue their road through part of the state, upon the treasurer of the company.

Under the Judiciary Act of 1789, the Circuit Court of the United States have concurrent jurisdiction with the state court, where the matter in dispute exceeds five hundred dollars:—

1. When an alien is a party.
2. When the suit is between a citizen of the state where the suit is brought and a citizen of another state; and by the twelfth section of that act, "if a suit be commenced in any state court *against an alien*, or by a citizen of the state in which the suit is brought against a citizen of another state," it may be removed for trial unto the next Circuit Court of the United States, to be held in the district where the suit is pending.

This is not a suit against an alien, but a suit brought by four plaintiffs, three of whom are aliens and one a citizen of the state,

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against a corporation originally created by the laws of the state of Connecticut, and doing business in the state, and the question to be determined is, whether, within the twelfth section of the act referred to, it is a suit commenced by a citizen of this state against a citizen of another state.

It has been held by the courts of the United States, that, within the meaning of the Judiciary Act, a corporation is a citizen of the state where it is created and doing business. *Ripple v. Delaware and Raritan Canal Co.*, 14 How. R. 1, 80; *Salmon Falls Manufacturing Co. v. Goddard*, ib. 446; *Philadelphia and Reading Railroad Co. v. Derby*, ib. 468; *Marshall v. Baltimore and Ohio Railroad Co.*, 16 How. 314. Within the meaning of the act, therefore, the New York and New Haven Railroad Company is a citizen of the state of Connecticut, but it is insisted that by an act of the legislature of the state of New York (Laws of 1846, p. 231), it is also a citizen of this state, and that such being the fact, the court of the United States have no jurisdiction, the suit being between the plaintiffs, one of whom is a citizen of the state, and a corporation also a citizen of the state. The act of the legislature of this state is not an act creating the defendants a corporation, but an act which recognizes them as a corporation already created and existing by the laws of the state of Connecticut, and granting them, as such existing corporation, certain rights and privileges in the state.

The act recites their previous incorporation by an act of the legislature of the state of Connecticut, and authorizes them to extend and continue their road through a part of this state, with liberty, for that purpose, to purchase and hold real estate, which are granted upon certain conditions and subject to certain liabilities. The personality of the defendants, therefore, as a citizen, within the meaning of the Judiciary Act of the United States, was established and fixed by the act of the state of Connecticut, which first gave them their corporate being, and for the purpose of this motion they must be regarded and treated as a citizen of that state.

The question, therefore, again recurs, whether the fact, that

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one of the plaintiffs is a citizen of the state, makes this a suit between a citizen of the state where the suit is brought and a citizen of another state, so as to authorize its removal into the court of the United States.

In *Shawbridge v. Curtis* (3 Cranch, 267), Chief Justice Marshall held, that each distinct interest should be represented by persons all of whom are entitled to sue or may be sued in the federal court; that is, when the interest is joint, each of the persons concerned in that interest must be competent to sue or liable to be sued in the court of the United States. Here the interest on the part of the plaintiffs is represented by four persons, one of whom is a citizen of the state and three of whom are aliens.

In respect to alienage, it has been held that the courts of the United States have not jurisdiction of suits between aliens, but only where an alien or aliens constitute one party and a citizen or citizens the other (*Massman v. Higginson*, 4 Dallas, 12; *Martalet v. Murray*, 4 Cranch, 46; *Hodgson v. Bowsbank*, 5 Cranch, 303; *Ward v. Arcdonde*, 1 Paine, 410); that is, a suit may be brought by an alien plaintiff against a defendant who is a citizen (*Chippendaile v. Dechauany*, 4 Cranch, 306), and vice versa, by a plaintiff who is a citizen against an alien defendant. In this case the three alien plaintiffs might sue the railroad company, the corporation being, for the purpose of determining the jurisdiction of the United States court, a citizen; and the other plaintiff, as a citizen of this state, might sue them as a citizen of another state. Each of the parties, plaintiffs and defendants, possessing, under the construction given to this act by Chief Justice Marshall, the requisite qualifications to sue or be sued in the courts of the United States. It is insisted, therefore, that the Circuit Court of this district has jurisdiction of a suit like this, brought against a citizen of another state by plaintiffs, one of whom is a citizen of the state and the other aliens, and that such being the fact the right of removal exists. But it does not follow, because the Circuit Court would have had jurisdiction of a suit if it had been originally brought there, that the defendants have a right to remove it thereto.

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An alien plaintiff may sue a citizen in the court of the United States; but if he thinks proper to bring his suit in a state court there is no authority for removing it. The right to remove is derived exclusively from the twelfth section of the act, and it makes no provision for such a case. That section provides only for two cases.

1. When the suit is *against an alien*.
2. Or, where the suit is between a citizen of the state where the suit is brought, and a citizen of another state; and a suit by an alien plaintiff is not embraced under either head.

Neither does the present suit come within either of the two cases in which a right to remove is given by this section. It is ~~not~~ a suit against an alien, but a suit brought by aliens conjointly with a citizen, and the fact that one of the plaintiffs is a citizen of the state does not make it a suit brought by a citizen of the state. He does not bring the suit; for, having but a joint interest, he could not bring it alone. The suit is brought by the four plaintiffs, who represent the united interest. It is not brought by him, but by them, and as they are not severally citizens, a suit brought by them, unitedly, is not a suit between a citizen of the state and the citizen of another state.

The motion must therefore be denied.

From the order entered, denying the motion, the defendant appealed to the general term.

*Noyes, Powers & Talmadge*, for appellants.

*Foster & Thompson*, for respondents.

INGRAHAM, FIRST JUDGE.—This appeal from an order of Judge Daly is submitted without any points or brief of either party.

The application is for an order to remove the cause from this court to the United States Circuit Court, upon the ground that the action is between citizens of different states. The answer to

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the application is, that three of the plaintiffs are aliens, and that the statute providing for a removal of a cause from a state court to the United States court does not apply to such a case.

After the full examination given by Judge Daly to this question, we do not deem it necessary to add to his opinion anything beyond our concurrence therewith. For the reasons stated by him, in his opinion delivered at special term, we think the order appealed from should be affirmed, with \$10 costs.

## GEORGE HUBBELL v. GARRETT D. CLARK.

H., being the lessee of certain premises under a lease ending May 1st, 1854, and the owner of a new lease commencing on that day, assigned the latter, on the 14th of March, 1854, to C., and gave him possession. In a subsequent action for rent up to the 1st May, 1854, *held*,

1. That parol evidence was admissible to show that C. took possession under H. prior to 1st May, 1854, and that evidence of such occupation, coupled with the declarations of the defendant, were sufficient to sustain an action for use and occupation prior to 1st May.
2. That in the Marine Court a complaint for "one quarter's rent of" premises, describing them and stating the amount claimed, was sufficient to sustain a recovery in such an action.
3. That a covenant by the plaintiff, in the assignment, against back rents, did not estop him from recovering for the use and occupation of the premises by the defendant, prior to the time when the assigned lease was to take effect.

APPEAL by defendant from a judgment of the Marine Court. This was an action for rent. The complaint was in these words: "One quarter's rent of Crystal, in Grand street, ending May 1st, 1854, with interest, \$225." The facts in the case, except as they appear in the opinion of the court, are as follows: The plaintiff, in March, 1854, was the lessee of certain premises called the "Crystal," in Grand street, New York city. He had also procured a new lease of the premises, dated the 1st of May, 1854, and running for five years. On the 14th of March, 1854, an

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agreement was made between the plaintiff and the defendant, in writing, whereby the plaintiff assigned this lease to the defendant. This assignment contained the following covenant on the part of the plaintiff:—

“And I do hereby covenant, grant, promise and agree, to and with the said Garrett D. Clark, that the said assigned premises now are free and clear of and from all former and other gifts, grants, bargains, sales, leases, judgments, executions, *back rents*, taxes, assessments and incumbrances whatsoever.”

On the same day an agreement was made between the defendant and one George D. Peshine, who had formerly occupied the “Crystal” under the plaintiff, by which the defendant agreed to put him in possession, under the original lease, and sell him the fixtures and furniture, upon condition of the punctual payment of certain sums of money mentioned in the agreement. Upon the trial of this action, which was brought to recover rent for the quarter ending 1st May, 1854, Peshine was called and testified, subject to objection, that previous to the 14th of March he was subject to the plaintiff and paid rent to him, after that to Clark. He also testified to conversations of the defendant, which are stated in the opinion of the court, in which the defendant admitted himself liable for rent up to 1st May, 1854. All the parol evidence, as to the arrangement between the plaintiff and the defendant, was objected to, on the ground that the written assignment of lease contained the entire agreement between the parties. The objection was overruled and an exception was taken. The court gave judgment for the plaintiff for one hundred and twelve dollars fifty cents, being equal to the rent of half the quarter ending 1st May. From this judgment the defendant appealed.

*Townsend, Dyett & Raymond*, for the appellant.

*H. W. Johnson*, for the respondent.

**DALY, J.**—The testimony showed that Hubbell, the plaintiff

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was the leasee of the premises up to the 1st of May, 1854, and that Peshine carried on business at the place, which was known by the name of the "Crystal," under an agreement with Hubbell. Hubbell had obtained a new lease of the premises, to commence at the expiration of the old one, that is, on the 1st of May, 1854. On the 14th of March, 1854, Hubbell assigned all his right, title and interest to the new lease to the defendant, and the defendant, who had also purchased from Hubbell the fixtures and furniture of the establishment, entered into an agreement in writing, with Peshine, whereby he agreed to give Peshine possession of the premises for the full term of the lease assigned to the defendant by Hubbell, and also to sell and deliver to Peshine the furniture and fixtures upon certain conditions, which were, the punctual payment of four promissory notes, amounting to the sum of \$1,700, the payment on the 1st of May, 1856, of the sum of \$1,300, then due by Peshine to the defendant, together with the payment of the rent and taxes and the performance of all the requirements of the said lease, upon the payment of which sum (\$1,300) all the right and interest, then held by Clark, the defendant, was to pass to Peshine. When these instruments were executed, that is, on the 14th of March, 1854, there was a quarter's rent then coming due under the old lease, and in the conversation that took place at the time, between Hubbell, Clark and Peshine, Hubbell asked who was to pay this rent, remarking, that as the property was going out of his hands, they could not look to him for rent. Clark then said to Peshine, "How about that?" to which Peshine answered, "Hubbell ought not to pay it, we will have to pay it." Peshine not being able to perform his agreement, had to give up the place on the 18th of April. In a conversation which the defendant then had with Peshine, he, according to the statement of Peshine, who wanted money, pleaded that he would have to pay the half-quarter rent (\$112.50) if Hubbell sued him, remarking, "that is \$112.50 anyway." In addition to this, Taylor, who acted as the attorney for all parties, when the instruments before mentioned were executed, testified that Clark said to Hubbell,

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"Who is going to pay the rent?" and Hubbell answered, "You, of course, the place is yours and I am not going to pay any more debts or anything about it," and when the papers were delivered, Clark said, in answer to a question from Taylor, that "it was too bad if he should have to pay the whole quarter, when he only occupied it the half," to which Hubbell answered, "You can't complain; you got it cheap enough; I lost enough by it." This conversation referred to the then running quarter. Judgment was rendered against the defendant for the half quarter, that is, \$112.50, from which judgment the defendant now appeals.

The first objection relied upon is, to a question put to the witness, Peshine. He was asked, when Clark, the defendant, took possession of the place. It was insisted that this appeared by the assignment of the lease. But such was not the fact. The lease did not go into effect until the 1st of May, a month and a half thereafter, and as Hubbell was, at that time (the 14th of March, 1854), the lessee of the premises under the old lease, it was entirely competent for him to show that the defendant took possession and had the use of the premises during this month and a half. The assignment merely showed that the defendant was to have possession under the new lease assigned to him, on the 1st of May thereafter, and the answer to the question in no way conflicted with, contradicted or affected the terms of that instrument. It was to the effect that Clark took Hubbell's place on the 14th of March, 1854, which he might well do, without any reference to a possession, which he was to have for five years, under the new lease commencing on the 1st of May, 1854. The assignment gave him no right to enter into possession on the 14th of March, 1854, which was prior to the commencement of the term granted by the lease, which had been assigned to him, and he could not enter into possession of the premises during the month and a half from the 14th of March to the 1st of May, unless by the authority and consent of Hubbell, who continued, up to the 1st of May, the lessee of the premises under the old lease.

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As the testimony showed, very clearly, that Clark went into possession on the 14th March, 1854, through his vendee, Peshine, he and Hubbell will be regarded as standing, during the month and a half, in the relation of landlord and tenant, unless it appears that the intention was otherwise, and that he was during that period to pay nothing. So far from its being the fact, that he was to have the beneficial use of the premises during that time, without charge, it appears abundantly, from the declaration made to him by Hubbell, from his acquiescence, and his declaration to Peshine, more than a year afterwards, that such was not the intention of the parties. He has had the beneficial use of the premises during that time, and he is liable to Hubbell for use and occupation. The complaint was sufficient to entitle the plaintiff to recover for use and occupation. It is for one quarter's rent of "Crystal," in Grand street, ending 1st of May, 1854, with interest, \$224. From the brief and general form of pleading which is allowable in justices' courts, they are to be construed with great liberality, and if they sufficiently apprise the opposite party of the nature of the claim it is all that is needed. The complaint here is for rent, specifying the period for which it is claimed and the amount of it. This is all that was necessary.

There is nothing in the other objections. The consideration to support the claim made was, the beneficial use and enjoyment of the premises. The covenant in the assignment of the lease, against back rents, constituted no estoppel. It did not preclude the plaintiff from showing that the defendant entered into a contract with him for the use and occupation of the premises for the time that was to intervene, before the lease, which was assigned, was to commence and have effect. The judgment should be affirmed.

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Whitlock v. Bueno.

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**THOMAS WHITLOCK and others v. FRANCISCO V. BUENO.**

In an action by several plaintiffs, as partners, for goods sold and delivered, the defendant cannot avail himself on the appeal, of the objection, that they omitted to prove their partnership, if he allowed the omission to pass without objection on the trial.

In an action for goods sold and delivered, the evidence showed that the defendant admitted the correctness of the bill and promised to pay it, but objected to the interest, and said he bought the goods on credit, without specifying the length of credit: *Held*, there being evidence that he had made payments on account before suit brought, that the judgment of the justice, in favor of the plaintiff for the amount and interest, was correct.

**APPEAL** by defendant from a judgment of the Marine Court. This action was brought by the plaintiffs, as partners, against the defendant, for goods sold and delivered. The only evidence offered was that of the plaintiffs' book-keeper, who testified that he presented the bill to the defendant, who admitted its correctness and promised to pay it. It appeared, on the cross-examination of this witness, that the defendant said at the same time that he bought the goods on time and objected to the interest, but did not say he would not pay it. It also appeared that he had made payments on account of the bill. No evidence of the plaintiffs' partnership was introduced, but no objection was made upon the trial on that ground, nor was any motion made for a nonsuit. Judgment was rendered for the plaintiffs, from which the defendant appealed.

*McCunn and Moncrief*, for the appellant.

*Edward W. Marsh*, for the respondent.

**INGRAHAM, FIRST JUDGE.**—No objection was made upon the trial to the want of proof that the plaintiffs were partners. The evidence showed that the property sold belonged to the plaintiffs—not to any firm—and as the defendant suffered it to pass without

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any objection, he is too late now to make it. If this objection had been taken on the trial, the defect of proof might have been remedied.

The evidence showed that the bill had been presented to the defendant and he promised to pay it. This was enough to make out the plaintiffs' case. The allegation of the defendant, that he bought on time, amounted to nothing. If he claimed a credit on the sale, it was incumbent on him to show on what credit he purchased the goods. Giving all the weight that could be given to such a remark, the justice could not say whether the term of credit was a week, a month, or a year, and the whole allegation, that he bought on credit, was inconsistent with the admitted fact of his having made payments on account of the purchase from a fortnight after the first purchase, and at various times subsequently—at any rate, no credit could be allowed, because no specific credit was proved.

The judgment should be affirmed.

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**GIBBONS L. KELTY AND DANIEL M. FERGUSON v. ELISHA F. JENKINS AND DANIEL M. HUGHES.**

The payee and first indorser of a promissory note gave to the holders, at its maturity and in renewal, his own note, indorsed and secured by a pledge of stock, for the purpose of obtaining an extension of time. It was accepted by the holders. *Held*, that this arrangement, having been made without the knowledge of the second indorser, discharged him.

A notice of appeal should specify, with distinctness, the errors alleged to have been committed by the court below, to rectify which the appeal has been taken. A general statement, "that the judgment is unsustained by and contrary to law and evidence," is insufficient.

**APPEAL** from a judgment of the Marine Court. This was an action against the defendants as indorsers of a promissory note. The defendant Hughes alone defended. It appeared upon the trial that the note, which was made by one Saxton, was indorsed by the defendants solely for the maker's accommodation. When

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it became due, the defendant, Jenkins, told the plaintiff that the maker promised to provide funds in about four months to meet the note, and requested the plaintiffs to take his individual note, secured by stock, which they accepted. The defendant Hughes knew nothing of this arrangement. Judgment was rendered in his favor, from which the plaintiffs appealed. The notice of appeal made no other specification of the ground of appeal, than that the judgment was unsustained by and contrary to law and evidence.

*R. Busteed*, for the appellants, quoted, *Bailey on Bills*, chap. 9, p. 338-340 (5th ed.); *Sargent v. Appleton*, 6 Mass. R. 85; *Callihan v. Tanner*, 3 Rob. (La.) R. 299; *Philpot v. Briant*, 4 Bing. R. 77; *Chitty on Bills*, chap. 9, p. 442-447 (8th ed.); *Bank of U. S. v. Hatch*, 1 McLean R. 93; *McLamore v. Powell*, 12 Wheaton R. 554; *Planters' Bank v. Sellman*, 2 Gill. & John. 230; *Margesson v. Gable*, 2 Chitty's R. 364.

*John O. Robinson*, for the respondent, quoted, *Church v. Barlow*, 9 Pick. 547; *Seabury v. Hungerford*, 2 Hill, 82, 84; *Bangs v. Strong*, 7 Hill, 250.

**DALY, J.**—It appears that when the note in suit became due, Jenkins, the payee, called upon Ferguson, one of the plaintiffs, and told him that the maker had promised to place funds in his (Jenkins') hands, to meet the note in four months, and proposed to give his (Jenkins') indorsed paper at four months in renewal, offering, as an inducement, ample security in stock. The proposal was accepted. Jenkins placed the security in Ferguson's hands and the paper in renewal was given. This arrangement was entirely without the knowledge of Hughes, the second indorser.

This was an express agreement to give time to the maker and payee, founded upon a good consideration, and operated to discharge Hughes. *Bank of Utica v. Ives*, 17 Wend. 501; *Gahn v. Niemcewicz*, 11 id. 312. It was not a mere indulgence, at the

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will of the plaintiffs, but, by accepting the indorsed paper of Jenkins in renewal, in consideration of the security placed by him in their hands, they suspended the right of action upon the original note, until the maturity of the paper taken in renewal (*Putnam v. Lewis*, 8 Johns. 389), and thereby discharged Hughes; that agreement having been entered into without his knowledge or consent.

The notice of appeal, moreover, was defective in not setting forth the grounds of appeal. To say that "the judgment is unsustained by and contrary to law and evidence," is a notice that might be given in every case, and would be a mere formality, furnishing no information whatever, to the opposite party or to the court, of the grounds upon which the appeal was brought. The notice should specify, with sufficient distinctness and certainty, the error or errors committed by the court below, to rectify which the appeal has been taken.

Judgment affirmed.

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#### TALBOT MURDEN v. PETER PRIMENT.

In an action to recover damages for a tort, the defendant cannot set up, as a counter-claim or recoupment of damages, an independent tort committed by the defendant and not connected with the transaction upon which the plaintiff's right of action is founded.

The cases specified in which, prior to the Code, the defendant was allowed to recoup his damages. *Per Daly, J.*

*It seems*, that all which formerly was allowed to be set up as a defence, by way of recoupment, is now available as a counter-claim under the Code.

APPEAL by defendant from a judgment of the Marine Court. This was an action to recover damages for injury to person and property. The defendant set up a counter-claim in his answer. The facts were these: The plaintiff occupied the first story of the store 145 Elm street, as a blacksmith's shop. The defendant occupied the story immediately overhead. He bored several

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auger holes in the floor of his room and poured water down on the workmen and tools in the plaintiff's shop. The tools were injured, the coal wet, and the plaintiff at one time was obliged to stop work in consequence. The defendant on the trial offered to prove, by way of recoupment or counter-claim, damages suffered by the defendant from smoke coming into his place from the plaintiff's forge. The evidence was excluded and the defendant's counsel excepted. A verdict of one hundred dollars was rendered for the plaintiff, and from the judgment entered on this verdict the defendant appealed.

*II. H. Morange*, for the appellant.

*Felix Hart*, for the respondent.

INGRAHAM, FIRST JUDGE.—The evidence offered of a counter-claim was properly rejected. I am at a loss to see how any counter-claim can arise in an action for trespass on lands. If there could be any case to admit of it, by the Code, § 150, it can only be where it is for a cause arising out of the transaction set forth in the complaint. This was for pouring water through holes in a floor upon the plaintiff's premises. The defendant sought to recover damages occasioned by smoke arising from the plaintiff's premises. How smoke from the plaintiff's premises can be said to arise out of a transaction such as the plaintiff complains of, viz.: pouring water from defendant's premises upon his, it is difficult to discover, unless it was occasioned by the extinguishment of the fires of the plaintiff by the defendant's acts. The evidence was neither admissible as a counter-claim nor in mitigation of damages.

The cause of action was fully proved to have been committed by some one on the plaintiff's premises, and under circumstances from which the assent or knowledge of the defendant might be presumed.

The conduct of the defendant and his answers, when informed of the injury, strengthened that presumption, and warranted a finding in the plaintiff's favor.

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There was no error in the justice's charge of which the defendant can complain. If there was any, it was in the defendant's favor.

The return does not show what verdict or judgment was rendered, but as the defendant appeals from a judgment, I conclude the judgment rendered was for the plaintiff. If so it should be affirmed.

DALY, J.—The defendant asked to set up a distinct and independent tort committed by the plaintiff, by way of counter-claim or as a recoupment of damages. The injury complained of could not be set up as a counter-claim, for the reason stated by the first judge, that it had no connection with the transaction upon which the plaintiff's right of action was founded, nor was it available to the defendant by way of a recoupment of damages. As the law stood before the Code, a recoupment of damages was allowed against a party seeking to enforce a contract where he had done something or omitted to do something, under the contract, whereby the other party had sustained loss or injury. As where the plaintiff erects a house for the defendant, but the work or materials are inferior to what was contracted for, then the defendant shall recoupe, or cut off, the deteriorated value of the work or materials from the contract price. *Foster v. Buller*, 7 East, 479; *Grant v. Button*, 14 Johns. 377; *Ives v. Van Epps*, 22 Wend. 155. So, where the contract is sought to be enforced, the defendant might recoupe damages for a breach of warranty on the thing sold (*Rait v. McAllister*, 8 Wend. 109; *Jones v. Scriven*, 8 Johns. 358; *Cook v. Moseley*, 13 Wend. 277), or for fraud, as where the plaintiff sold a mare, knowing it to be diseased, or made fraudulent representations on the sale of land. *Benton v. Stewart*, 3 Wend. 236; *Spalding v. Vandercrock*, 2 id. 431; *Allaire v. Whitney*, 1 Hill, 414; *Bleecker v. Vrooman*, 13 Johns. 302; *Till v. Rood*, 15 id. 230; *Lewis v. Cosgrove*, 2 Taun. 2; *Van Epps v. Harrison*, 5 Hill, 63. So, in an action by an attorney or surgeon for services, the defendant might recoupe for the damages resulting from the plaintiff's want of skill (*Gleason*

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v. *Clark*, 9 Cow. 57; *Hopping v. Quin*, 12 Wend. 517; *Fleming v. Niagara C. P.*, 12 id. 246; *Duffet v. James*, cited in 7 East, 479), or in an action for use and occupation, the defendant may recoupe damages for the breach of an agreement to keep the premises in repair. *Westlake v. Degraw*, 25 Wend. 669; *Ethridge v. Osborn*, 12 id. 529; *Dorwin v. Poller*, 5 Denio, 306. But there can be no recoupment for a distinct and independent wrong on the part of the plaintiff. *Cram v. Dusser*, 2 Sandf. S. C. 120. It is allowable only where a man brings an action for a breach of a contract between him and the defendant, and the defendant can show that he has sustained injury, in consequence of the violation of some stipulation or condition in the contract on the part of the plaintiff. *Ives v. Van Epps*, 22 Wend. 155. Thus, in *Cram v. Dusser*, the tenant, in an action for rent, was not allowed to recoupe damages for negligent and tortious behavior on the part of the landlord, his servant, in making repairs upon the premises, though the right to enter and make repairs was reserved by the lease. It is presumable that all that was allowable formerly by way of recoupment is available under the Code as a counter-claim, and if the defendant could not set up the injury complained of as a counter-claim, he could not do so by way of recoupment.

Judgment affirmed.

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**LUTHER CHAFFEE v. RICHARD COX.**

N. sold boots and shoes to the wife and children of the defendant, for which this action was brought by N.'s assignee. The answer set up a counter-claim for a cemetery lot sold to N. by the defendant's wife. The evidence showed that the defendant's wife had sold to N. a certificate which entitled him to a deed of a lot in the C. H. Cemetery, that he obtained upon the certificate such a deed from the company owning the cemetery, and took possession under it. There was also some evidence of an agreement between him and the defendant's wife, that he should pay for the lot, one half in boots and shoes; *Held*:

1. That this did not constitute a good counter-claim in the action against the de-

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feudant by the plaintiff's assignor. It was neither in favor of the defendant nor against the plaintiff.

2. That though it was not admissible to establish a counter-claim, it was admissible for the purpose of showing that the goods were delivered to the defendant's wife, in payment of moneys owing to her by N., and that no liability was ever incurred on the part of the defendant to pay for them.
3. That under the loose system of oral pleadings allowed in justices' courts this evidence was admissible in such a court, under an answer which set up the facts as a counter-claim.
4. That it was immaterial whether the defendant's wife gave to N. a strictly legal transfer for the lot, provided he obtained, upon the certificate given to him, possession of the property and a sufficient deed thereof.

Parol proof of the commencement and trial of a former suit is admissible; but it seems not evidence of matters that would appear in the pleadings.

A witness, in testifying to a conversation, will not be required to give the precise words used. He may be allowed to state the substance merely.

A notice to the plaintiff, to produce a letter written by the defendant to the plaintiff's assignor, does not entitle the defendant to offer secondary evidence of its contents, upon the plaintiff's failure to comply with the requisition in the notice. He should subpoena the assignor to produce it. If it has been lost or destroyed, parol evidence of its contents may be given.

Whether the written rules of a company may be proved by parol? *Quere.*

APPEAL by plaintiff from a judgment of the Fourth District Court. This action was brought by plaintiff, as assignee of one Ward Newman, to recover thirty-nine dollars for a lot of boots and shoes sold and delivered to the wife of defendant. The defendant in his answer, in addition to the general denial, interposed a counter-claim or set-off for sixty-one dollars, for a lot in Cypress Hills Cemetery, alleged to have been sold by his wife to Ward Newman. The sale and delivery of the boots and shoes, and the assignment of the claim to the plaintiff, having been proved, the defendant called as a witness N. G. Palmer, superintendent of Cypress Hills Cemetery, who testified, subject to the objection of the plaintiff's counsel, that in May, 1851, Mr. Newman came to the cemetery, to select one of the lots belonging to the defendant's wife, who, it elsewhere appeared, was the widow of one Mr. Van Wyck, who had been a large owner in the cemetery. Mr. Palmer could not identify the lots without the certificates. In the following month Mr. Newman came

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again, with the defendant and his wife. She brought with her about a dozen certificates. Mr. Newman selected a lot, and the corresponding certificate which was produced on the trial was given him by the defendant's wife. Mr. Newman took possession of the lot and obtained a deed from the company.

This evidence the plaintiff's counsel moved to strike out, upon the ground that in this action against the husband, for a debt due by him, a claim of the wife, upon the sale of her sole and separate property, could not be interposed as a counter claim. The court denied the motion and the plaintiff's counsel excepted.

The defendant then called his daughter, who testified, that she heard a conversation in regard to a cemetery lot, between Mr. Newman and Mrs. Cox, in which Mr. Newman agreed to give for it one-half in shoes and one-half in money, and that she obtained shoes of Mr. Newman two or three times thereafter, for account of Mrs. Cox. It did not appear in that conversation what amount in all he agreed to give. The evidence as to the conversation was objected to, on the ground that the witness should not be permitted to state the substance of the conversation, but should be required to state it specifically and in detail. The objection was overruled and an exception was taken.

The defendant then offered in evidence a copy of a letter, written by him to Ward Newman, the assignor of the plaintiff, having previously given to the plaintiff notice to produce it upon the trial. The counsel for the plaintiff objected to the admission of the copy in evidence, and excepted to the ruling of the court admitting it.

The plaintiff called, in rebuttal, Edward Martin, who testified that he purchased a certificate of a lot in Cypress Hills Cemetery of Mr. Van Wyck, in his lifetime, which he subsequently passed to Mr. Newman, and Mr. Newman testified that the company refused the lot to him, without the indorsement of Mrs. Van Wyck, the defendant's wife, that he procured her indorsement upon it accordingly, and that she went with him to the cemetery to point out the lot. The number and description of this cer-

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tificate, as described by the witnesses, did not correspond with that produced by the defendant. The defendant thereupon recalled the superintendent of the cemetery, who testified, that the rules of the cemetery provided for a forfeiture of lots for the nonpayment of moneys due upon them, and that the records of the cemetery showed that a lot belonging to Mr. Newman had been forfeited accordingly. Neither the rules nor records of the cemetery were produced, and the evidence was objected to by the plaintiff's counsel and an exception taken to its admission.

In the course of the trial, the defendant's counsel asked of Mr. Newman the following questions upon cross-examination:

*Question.* Did you bring a suit in your own name in this court before the assignment for the same matter and against the same defendant? Question objected to, admitted and an exception taken.

*Answer.* I did. That suit was partly tried. Latter part of this answer objected to, objection overruled and plaintiff's counsel excepted.

*Question.* What became of that suit? Same objection, same ruling and exception taken.

*Answer.* I withdrew it.

The cause having been submitted, judgment was rendered for the defendant, and the plaintiff appealed.

*Arnold H. Wagner*, for appellant, contended, among other things: 1. That the justice erred in allowing the counter-claim interposed by the defendant. It is well settled that a claim, to constitute a set-off or counter-claim, must exist in the defendant's own right, and cited the following cases: *Johnsons v. Bridge*, 6 Cow. 693; *Dulois v. Dubois*, 6 Cow. 494; *Wolfe v. Washburn*, 2 Cow. 262; *Prior v. Jacobs*, 1 Johns. Cas. 169. Admitting that the defendant's wife sold a lot to Newman, the claim which she may have arising out of that transaction cannot be used by the defendant to defeat a personal claim against him. 2. That the wife had no cause of action, in her own right or otherwise

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against Newman for the price of the lot, for there was no evidence that she was its owner.

*William Silliman*, for respondent.

INGRAHAM, FIRST JUDGE.—This action is brought to recover from defendant the price of certain boots and shoes, sold by the plaintiff to defendant's wife and children. The answer denied the plaintiff's claim, and set up a counter-claim for a lot sold by the defendant's wife to plaintiff, in the Cypress Hills Cemetery.

The admission of the evidence as to the counter-claim was objected to by the plaintiff. He also attempted to show, that the lot in the cemetery was bought by him from Martin and not ~~the~~ defendant's wife.

There can be no doubt that, so far as the evidence was intended to establish the counter-claim, it was erroneously admitted.

The 150th section of the Code, allowing the counter-claim, requires that it must be in favor of the defendant and against the plaintiff. The claim attempted to be set up as a counter-claim was neither in favor of the defendant nor against the plaintiff. If it belonged to any of the parties or persons connected with them, it was the separate property of the defendant's wife, and was a claim which she, as such, could have enforced against Newman, without reference to her husband's debts.

But, although it could not be set up as a counter-claim, I think the evidence was admissible under the general denial of the plaintiff's complaint. The claim was for goods sold to the defendant's wife. The answer denied, generally, the plaintiff's claim.

Proof that the defendant's wife, before the goods were purchased, had delivered to Newman either money or property, for which she was to receive from him goods in payment, destroyed the plaintiff's cause of action, not by establishing a counter-claim, but by showing that the goods were delivered in payment of moneys owing by Newman to Mrs. Cox, and of course that no contract was ever made with Newman on behalf of the hus-

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band (the defendant), or that he ever incurred any liability therefor.

There is proof of an admission, by Newman, that he had purchased from Mrs. Cox this share, and was to pay for it, one-half in cash and one-half in shoes, to Mrs. Cox. If this was so, then the sale was not to the defendant, but the shoes were delivered in payment of a previous indebtedness existing on his part to Mrs. Cox.

Under the very loose system of oral pleading allowed in these courts, we do not apply the strict rules of courts of record to them. If, by any reasonable construction, the testimony is admissible without doing injustice to the parties, we do not feel called upon to consider such an error fatal.

The question as to who sold Newman the certificate, whether Martin or Mrs. Cox, was a question of fact for the court below, depending on contradictory testimony, and with that decision we see no ground to interfere. There is abundant evidence to sustain the finding on this point.

Whether the transfer to Newman from Mrs. Cox was strictly legal or not, is immaterial. It answered the purpose intended, so that by its surrender the company gave to Newman a deed for the premises. It does not belong to the purchaser to set up that defence after he has received the value of it.

The testimony of a former suit was immaterial. So far as it was admitted, oral proof was admissible. It was proper to ask whether a suit had been brought and whether it was tried. If they had gone further and proved by parol what would have appeared by the pleadings, then it would be erroneous. But no such evidence was offered.

The objection to the substance of a conversation being given, and not the exact words of it, is not well taken. It is seldom that any witness can detail the precise words used, and where the witness cannot he is allowed to state the substance as near as he can.

There was not sufficient evidence to warrant the admission of a copy of the letter marked "D." The notice to produce it was

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served on the plaintiff, while nothing shows that it was ever in his possession. On the contrary, the letter was addressed and sent to Mr. Newman and not the plaintiff. It was not the plaintiff's business to obtain testimony for the defendant which was not in his possession. The witness Newman should have been subpoenaed to produce the letter, and if he had lost or destroyed it, on proof of that fact, parol evidence of its contents was admissible, but not otherwise.

There is also some ground for objection to the rulings of the justice, as to allowing parol proof of the by-laws or regulations of the cemetery as to forfeiting shares not paid for—where such regulations are reduced to writing, they should be produced and ~~not~~ proved by the mere recollection of a witness. It is unnecessary, however, to examine the other objections as to testimony, because the judgment must be reversed, for the reasons above stated, as to the admission of parol proof of the contents of defendant's letter.

Judgment reversed.

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#### ADOLPHUS F. BUDDENBURG v. VALENTINE BENNER.

It is not necessary that a guest at an inn should keep his room locked at all times during his absence, to entitle himself to protection against robbery, and to make the inn-keeper liable to him for loss from such a cause.

Where a boarder at a public-house took a friend to his room, who stayed there all night, and the evidence showed that they were together the next day, during which time the guest was robbed of his clothes from his room in the hotel; *held*, that he was not thereby prevented from recovering from the inn-keeper the value of the goods so stolen.

APPEAL from a judgment of a justice of a district court. This action was brought by Adolphus F. Buddenburg, as assignee of John Wendlandt, against Valentine Benner, to recover for the loss of clothing stolen from Wendlandt's room, while a

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guest at the Monte Christo, a boarding-house kept by defendant.

On the trial it appeared that the defendant kept a boarding-house, and plaintiff's assignor was one of his boarders. On the day of the theft, at about 7 o'clock in the morning, Wendlandt left his room, locking it, and leaving the key with the bar-keeper employed by defendant. There were two locks upon the door; but he locked one only. The key was afterwards given to the servants of the house, to enable them to clean the room. At about 7 o'clock in the evening, Wendlandt returned to his room and found the clothing in question had been taken from it during his absence.

It also appeared that, on the night previous, Wendlandt brought a fellow-workman, Lubin by name, to sleep with him. Lubin slept in the room that night, left in company with Wendlandt in the morning, worked in company with him that day, and came back with him at night.

The justice rendered judgment in favor of the plaintiff, and defendant appealed.

*Joseph Lux*, for the appellant, contended that plaintiff had been guilty of negligence; 1st, in locking only one lock; 2d, in bringing Lubin home to sleep with him. *Brown v. Maxwell*, 6 Hill, 592; *Kreig v. Wells*, 1 E. D. Smith, 74.

*F. Sayre*, for the respondent.

**INGRAHAM, FIRST JUDGE.**—There is nothing in this case to warrant the charge of negligence on the part of the plaintiff so as to prevent his recovering.

It is not necessary that a guest should keep his room locked at all times, so as to entitle himself to protection against robbery. But in this case the evidence shows that he did lock the room on leaving it, and that the key was left with the landlord's bar-keeper. He did all that was necessary for his protection. The key was afterwards given to the servant and no further account

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is given of it, and the natural presumption is, that the robbery was perpetrated after that time.

Nor was there any ground for imputing the theft to the person who staid with the guest that night. The evidence shows that he left with the guest in the morning, when the room was locked up, and was in his company during the day, and after they returned to the house they were informed of the theft.

There is no reason for interfering with the judgment on either of the grounds stated by the defendant's counsel.

Judgment affirmed.

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#### ISAAC PISER v. STEARNS & MARVIN.

It seems, where a chattel is delivered upon a bargain for the purchase thereof, and to pay a stipulated price therefor at a future day, and such delivery is upon the express contract that, until the price is paid, the owner parts with, and the person receiving the chattel acquires, no title, the latter takes no interest before payment, which can be sold on execution against him; and, on default in payment, the vendor may recover the property or maintain an action for its value, even from a *bona fide* purchaser at a sheriff's sale, on an execution against the party to whom the chattel was thus delivered.(a)

A claim for the wrongful conversion of a chattel, which is a cause of action arising out of a tort, cannot be set up by way of counter-claim, in an action arising upon contract.

APPEAL from a judgment of a justice of a district court. The plaintiff claimed to recover the value of an iron safe, sold to the defendants at a stipulated price. The defence was, that the plaintiff had converted to his use an iron safe belonging to the defendants, and the possession of which they had parted with to Gross & Morass, under the following agreement, viz.:-

" NEW YORK, July 1st, 1854.

" Received from Stearns & Marvin, one patent salamander safe, No. ——, delivered to us this day, under a bargain for the

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(a) See *Herring v. Hoppock*, 15 N. Y. Reports, 409.

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sale thereof, and for which we have given our note at six months for \$80. And it is expressly understood that said Stearns & Marvin neither part with nor do we acquire any title to said safe until said note is fully paid. And in case of default in the payment thereof at maturity, said Stearns & Marvin are hereby authorized to enter our premises and take and remove said safe, and collect all reasonable charges for the use of the same.

(Signed) "GROSS & MORASS."

The note given was not paid, and before it became due the sheriff, under an execution against Gross & Morass, sold the safe to one Alexander, who afterwards sold it to the plaintiff, who was in the possession of it when this action was commenced. It had been duly demanded of him by the defendants, and he refused to deliver it up.

A counter-claim was set up in this action for the value of the safe, stated to be \$85, and on these facts being shown the justice gave judgment in favor of the defendants, for the difference between the price at which the plaintiff sold his safe to the defendants, and the value of the defendants' safe so converted by the plaintiff.

The plaintiff appealed.

*E. Yenni*, for the appellant.

*R. S. Emmett*, for the respondent.

I. The respondents were the owners of the safe sold by the sheriff, under execution against Gross & Morass, and afterwards in the possession of the appellant, who tortiously converted the same. 1. The interest of Gross & Morass was not transferable so as to affect the rights of the respondents, and any attempt of Gross & Morass to transfer the safe, or any levy thereon under a judgment against them, entitled the respondents to the immediate repossession. 2. The sale by the sheriff, if valid at all, was only so to the extent of the interest of Gross & Morass, and the

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title acquired by a purchaser was subordinate to the rights of the respondent. 3. The sheriff's sale, therefore, passed no interest whatever, and the purchaser, as in all purchases at sheriffs' sales or elsewhere, takes the chances of good or bad title.

II. The claim of the respondents, for the value of the safe thus tortiously converted by the appellant, was a proper subject of set-off to the appellant's claim for which this suit was brought. 1. In all cases of conversion, the party injured may waive the tort and bring assumpsit for goods sold and delivered. 2. The tort being thus waived, the claim becomes a money demand on contract.

INGRAHAM, FIRST JUDGE.—The defendants in this case set up in their answer, by way of counter-claim to the plaintiff's demand, a claim for damages for the non-payment for and conversion of an iron safe, owned by the defendants, which the court below admitted, and gave judgment for the defendants for a balance thereon.

It can hardly be necessary to discuss the question whether, in a proper form of action, the defendants could recover from the plaintiff the safe referred to. It will be enough, for this case, to concede such right to the defendants; and I think the authorities sustain their claim to it. They never parted with the title, but by an express contract they retained it and refused to allow any title whatever to pass until the safe was paid for.

Under such a contract the persons who had possession of the safe had no title or interest in it which could be the subject of levy, or sale by the sheriff. *Andrew v. Dieterich*, 14 Wend. 32; *Salter v. Everts*, 20 Wend. 273.

The defence was improperly admitted as a counter-claim. By the 150th section of the Code of Procedure, the counter-claim allowed must be a cause of action arising on contract, and existing at the commencement of the suit. It does not allow a claim for damages for a tort to be used for that purpose. Here the defendants, in their answer, claim to recover damages for the conversion of a safe. This is not a cause of action arising out of

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a contract, but out of a tort. It does not aver any sale or delivery of goods, or any contract between the plaintiff and defendants, nor does the evidence show any. On the contrary, the facts proven were the ordinary matters of evidence to establish an action of trover, viz., title to the goods in the claimant, and a demand upon and refusal by the person in possession to deliver them up.

We had occasion to examine a similar question at the general term, January, 1855, in *Drake v. Cockcroft* (4 E. D. Smith, 34; 10 How. Pr. Rep. 377), where a counter-claim for property illegally held by the plaintiff was claimed by the defendant, and the court held that no such demand could form the subject of a counter-claim.

It is said that the claimants may waive the tort, and bring ~~assumpsit~~ for the goods. This is undoubtedly true, but still it does not make the claim available as a counter-claim. Because,

1st, It does not arise upon a contract. The cause of action arises in a tort, and no fiction of law can alter its nature, although it may alter the remedy. The tort, viz., the refusal to deliver the property to the owner on demand, is the origin. The law allows him, by a fiction, to recover its value by an implied *assumpsit*; but that does not make its origin a contract.

2d. The answer does not present the claim as founded on contract. It alleges the tort, and claims for the conversion. This can never, as a matter of pleading, be called a contract; and if a party may waive the tort and bring *assumpsit*, it is sufficient to say that he did not waive the tort, nor set up a claim in *assumpsit*, but in tort in the present case.

The judgment must be reversed.

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**HARDY v. SEELEY.**

Where a justice of a district court enters judgment for an amount less than that found by him to be due, although through inadvertence, this court cannot give the proper judgment, but can only reverse and allow a new action to be brought.

**APPEAL** from a judgment of a justice of a district court. The facts are stated in the opinion.

**BRADY, J.**—The justice announced, on the conclusion of the trial before him, a judgment for the plaintiff for the sum of \$63.90, the parties being present; but he inadvertently entered judgment on the process for \$13.90. The defendant was notified of this error, and to attend before the justice to have it corrected. He did attend, but refused to consent to the alteration, and the justice declined to make it upon the ground that he had no authority to do it.

We have held that we have no power to give the judgment the justice should have rendered. We can only reverse the judgment, and allow a new action to be brought.

Judgment reversed.

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**THOMAS NORRIS v. GEORGE BLEAKLEY**

In a justice's court, the absence of the plaintiff upon the day to which the cause has been adjourned is a discontinuance of the action. And where the trial of a cause was commenced, and after the defendant had opened his defence it was adjourned, and the plaintiff failed to attend on the adjourned day, *held*, that the justice erred in proceeding with the defendant's testimony and awarding judgment in his favor, although a counter-claim had been interposed. This court cannot, on reversing the judgment of a justice's court, preserve the testimony of a witness who has left the state since the former trial, and whose testimony cannot be again procured. The power of the court is exhausted upon a

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reversal, except where the judgment appealed from is entered by default, which is the only case wherein a new trial may be ordered.

**APPEAL** by plaintiff from a judgment of the Fourth District Court. This action was brought by the plaintiff, a stable keeper, against the defendant, a physician, to recover for the keep of his horse, &c. The answer, in addition to a general denial, contained a defence of payment and a counter-claim. The trial of the cause was commenced on the 25th of January, 1855. The plaintiff closed his testimony on that day, and the defendant opened his case; but before he concluded the cause was adjourned by the justice, upon his own motion, to the 6th day of March. On that day the clerk of the plaintiff's counsel appeared and asked for an adjournment, on account of the counsel's engagement in another court. The motion was denied, and he left the court-room. The defendant then proceeded and closed his case, and the justice rendered judgment in his favor for twenty-five dollars. From this judgment the plaintiff appealed.

*Ten Broeck and Van Orden*, for the appellant, cited 2 Cowen's Treatise, 578 and 587; *Sprague v. Shed*, 9 Johns. R. 140; *Seaboard and Roanoke R. R. Co. v. Ward*, 1 Abbott's Pr. R. 46.

*J. D. and T. D. Sherwood*, for the respondent, cited *Smith v. Morgan*, Ms. Gen. T. Com. Pleas, Sept. term, 1855; *Sperry v. Mayor*, 1 E. D. Smith C. P. R. 861; *Cockle v. Underwood*, 1 Abbott's Pr. R. 1.

**BRADY, J.**—The plaintiff having rested his case in the court below, the defendant commenced his defence, and before his proofs were completed the cause was adjourned, by consent, until the 6th of March, 1855. The defendant had pleaded payment and a counter-claim among his defences, and on the 6th of March, to which the cause had been adjourned, the plaintiff did not appear. The defendant, nevertheless, proceeded with

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his proofs, and the justice rendered judgment in his favor for \$25.

Prior to the Code of Procedure, and down to the adoption of Rule 47 of the late Supreme Court in 1845, if, the jury having retired to consider upon their verdict, the plaintiff did not answer when they returned to the bar to render it, the judgment of the court was that of nonsuit (1 Burrill's S. C. Pr. 241, and cases cited; *Gale v. Hoysradt*, 7 Hill, 179); but the result of the plaintiff's not appearing on the day to which the cause was adjourned was the same, notwithstanding the 47th rule of the Supreme Court above referred to, which did away with the practice of calling the plaintiff only after the jury had retired.

In justices' courts the failure of the plaintiff to appear was a discontinuance of the action in effect (*Sprague, &c. v. Shed*, 9 Johns. 140; *Green v. Angel*, 13 Johns. 469); and whatever changes the Code may have created in the practice in courts of record by the provisions for affirmative relief to the defendant, this, as we shall see presently, is still the rule as to justices' courts.

The eighth section of the Code of Procedure declares the act by which it is created to be divided into two parts—the first relating to courts of justice and their jurisdiction, and the first four titles of the second part relating to actions in *all* the courts of the state, and the other titles to mayors' courts of cities, to recorders' courts of cities, and to courts of record specifically named. The 15th subdivision of section 64 declares, that the provisions of the act respecting forms of action, parties to actions, the rules of evidence, the times of commencing actions, and the service of process on corporations, shall apply to these courts. Neither of the sections 263 and 274, which provide for affirmative relief to the defendant, is embraced within the first four titles of the second part of the Code; and there is no section by which they are made applicable to justices' courts. The power given by the sections just mentioned was doubtless designed to enable the courts of record to enforce the equality jurisdiction which was acquired by the changes in the judicial system, in

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addition to the authority they possessed in actions of a purely common-law character. Whether this be so or not, the justices' courts, being creatures of the statute, have no power save that which is expressly given by the legislature; and no such power as that exercised in this case having been delegated, the justice was wrong in proceeding with the action in the absence of the plaintiff, and the judgment pronounced by him must be reversed.

This conclusion renders it unnecessary to consider the other questions presented by the appeal.

The respondent asks us to preserve the testimony of P. Grady, a witness who has left the state, and whose evidence cannot be procured again, provided the judgment be reversed. This ~~we~~ cannot do. It is the duty of this court to reverse the judgment, and that done the power of the court is exhausted, except in cases where the judgment is entered by default, in which case only a new trial may be ordered. The proceedings in any further action between the parties cannot be interfered with by this court.

The defendant was entitled to judgment of dismissal; and as the justice has rendered a judgment in favor of the defendant, and has also awarded to him damages, as we are authorized to affirm or reverse the judgment in whole or in part, we reverse so much of the judgment as allows the defendant damages, and affirm the judgment in defendant's favor as a mere judgment of dismissal, without costs to either party.

Judgment accordingly.

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#### CHARLES E. THOMPSON v. JOSEPH H. WOOD.

This court will not reverse the finding of a referee upon a question of fact, although it differs from him in the result at which he has arrived, if there is conflicting evidence upon the point.

In an action brought by an employee to recover the contract price agreed to be given him, upon an averment of readiness and tender of performance on his part,

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and refusal to accept performance on the part of his employer, it is no defence that a former action has been brought by him to recover both damages for the defendant's breach of the contract in discharging him and a balance of salary up to the time of his discharge, where the claim for damages was withdrawn upon the trial, and judgment rendered only for the balance due for services actually rendered prior to the discharge.

And a tender of performance having been made prior to such action, it is not necessary to repeat the tender in order to maintain a new action on the contract. In such an action, the employee, having been discharged without just cause, is entitled *prima facie* to recover the full amount of the contract price up to the time of the commencement of the action. It devolves upon the defendant to show, in mitigation of damages, that the plaintiff might have obtained employment elsewhere.

APPEAL by defendant from a judgment entered on a report of a referee. The plaintiff brought this action to recover two months' salary. He claimed to have been employed by the defendants for one year from the 1st May, 1854, at a salary of \$1,500, as superintendent of their factory—averred a readiness and tender to perform on his part, but a refusal on theirs to allow him to do so, and claimed the proportionate amount of salary due from 20th September, 1854, at which time he was discharged, to the 23d day of November, 1854, the time of the commencement of the action. The defendants denied that the plaintiff was hired by the year, and plead in bar a former recovery in the Marine Court for the same cause of action. Upon the trial they also offered evidence for the purpose of showing that they had good reason, in the plaintiff's inattention to his business, for discharging him as they did in September. The cause was tried before a referee. Two witnesses, Ira Merchant and Eliphalet Noyce, sworn for the plaintiff, testified to conversations on the part of the defendants, in which they stated that the plaintiff was employed for the year. The defendants then proved that in October an action was brought against them by the plaintiff to recover a balance due for services, and also damages for breach of contract. But it also appeared that the claim for damages was withdrawn on the trial, and judgment rendered only for a small balance due the plaintiff at the time of his discharge. The defendants also offered some evidence for

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the purpose of showing that the plaintiff was inattentive to his business. It appeared by the testimony that he was confined at his home in Fordham by sickness for some little time prior to his discharge, but there was no evidence of any complaint with him on that account. It also appeared that he was seen several times at the races on Long Island, and there was some conflicting evidence as to his habits—whether temperate or not, and whether he was attentive to his business, or otherwise. It further appeared that the plaintiff tendered his services to the defendants prior to the suit in the Marine Court. There was no evidence of any subsequent tender, nor did the plaintiff offer any evidence of any special damage. The referee found, as matter of fact, that the plaintiff was hired for the year, at a salary of \$1,500, and was discharged without just cause, and reported in the plaintiff's favor for the full amount of his salary, from the time of his discharge up to the time of the commencement of the action. Judgment was perfected on this report, and the defendants appealed therefrom.

*C. N. Pöller*, for the appellants, contended, 1st. That the plaintiff must show a tender of performance subsequent to the suit in the Marine Court, in order to recover. 2d. That in the absence of special damage the plaintiff could recover only nominal damages, citing *Sherman v. Comstock*, 21 Wend. 257; *Clark v. Marseglia*, 1 Denio, 317; *Wilson v. Martin*, ibid. 602; *Spencer v. Halstead*, ibid. 606; *Hecksecher v. McCrea*, 24 Wend. 304; *Ogden v. Marshall*, 4 Selden, 340; *Dunn v. Murray*, 9 B. & C. 780; 4 S. C., 4 M. & R. 571; *Clark v. Mayor of New-York*, 4 Coms 343. 3d. That the suit in the Marine Court was a bar to this—or at least a bar to the recovery of any damages sustained prior to the commencement of that suit, citing *Bouchaud v. Dias* 3 Denio, 243; *Bruen v. Hurd*, 2 Bar. 596; *Fish v. Folley*, 6 Hill, 54; *Embry v. Connor*, 3 Coms. 522.

*James Parker*, for respondent.

**INGRAHAM, FIRST JUDGE.**—There was sufficient evidence as

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to the employment of the plaintiff by the defendants to carry the question to the referee. Even if Merchant's testimony was doubtful, Noyce testified expressly to the admission of defendants, made on 1st May, 1854, that the plaintiff was to remain in their employ for another year. The question belonged to the referee, and he has passed upon it, so that we cannot interfere with his finding on this point.

There was no necessity for a new offer of services after the recovery in the Marine Court action. The court allowed the plaintiff to withdraw his claim for damages for the breach of the contract, and the court only gave judgment for the balance of salary up to 20th September, when the plaintiff was discharged from defendants' employ. If, after the plaintiff's offer to perform, which was refused, the defendants had determined to employ the plaintiff again, he should have given him notice that he required his services: not having done so, the presumption of law is, that his determination, before expressed, not to employ him, still remained unchanged.

The defence of misconduct, to warrant the plaintiff's discharge, is not set up in the answer.

The referee has, however, passed upon this defence on conflicting testimony, and the remarks upon the first point are equally applicable and conclusive as to this one.

The judgment in the Marine Court was no bar to this action. Where an agreement of this kind is broken, the person employed has his election, either to sue for his wages as they become due from time to time, or to bring one action for damages for the breach of the contract. If such action is brought before the term of hiring has expired, and the party recovers damages for such breach of the contract, such recovery estops him from bringing another action. But if his action is merely to recover the wages due at the time of bringing the action, he is not thereby deprived of his right either to recover wages subsequently becoming payable, or an action for damages for the subsequent breach of the agreement in not employing the plaintiff according to the contract.

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Upon the trial of this case in the Marine Court (as the justice testifies), he permitted the plaintiff therein to withdraw the claim for services since the 20th September, and that he only passed upon the claim for wages up to that date. This is conclusive to show that the claim for damages was not adjudicated upon in that action.

There is no ground for interfering with the report of the referee in this case upon any of the points above stated.

The remaining question is as to the amount of damages which the plaintiff should recover. This point was discussed in *Hein v. Wolf* (1 E. D. Smith, p. 70), and the right to recover, as damages, the full amount, was held to be proper, unless it appeared that the party could have procured other employment. The obligation to show this rested on the defendants. The same extent of liability is recognized in *Costigan v. The Mohawk and Hudson R. R. Co.* (2 Denio, 608), in which the court says: "The defence set up should be proved by the one who sets it up. He seeks to be benefited by the fact, and he should therefore prove it." In that case the court also held that, as the plaintiff had not been shown to have had other employment, the recovery might extend to the full compensation promised by the contract.

There is evidence that the plaintiff was sick at Fordham, and such sickness, if it rendered the plaintiff permanently unable to discharge his duties, might authorize his discharge; or if, when his services were tendered, he was unable to discharge his duties, such tender might be unavailing. This tender was made shortly before the commencement of one of the actions; and the sickness at Fordham appears to have been in August, and to have terminated before the 26th September, because on that day it is in proof that the plaintiff went to the races, and the witness speaks of it as having been after the sickness at Fordham, and that was after the discharge on 20th September. The referee also finds that such discharge was without just cause, and I conclude, therefore, his finding was against the defendant on this point.

However I might differ with the referee in the result to which

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he has arrived, still I could not interfere with his finding. The facts are conflicting, open to discussion, and perhaps in some respects to doubt, as to the proper conclusions upon them, but the report is not so clearly against the weight of evidence as to warrant this court in setting it aside.

Judgment affirmed.

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#### JAMES NOBLE v. THOMAS CORNELL.

Where a note is made for the purpose of procuring a loan of money thereon, and it is delivered upon the agreement that the loan shall be made in bank notes of a foreign corporation, of a denomination less than \$5, which the maker is to keep in circulation until the payment of the note, the note is not void if the agreement is not carried out, but the advance actually made upon the note is made in city funds.

A loan made by a foreign corporation upon a note, of the whole amount thereof, without deducting or receiving any discount, is not within the provisions of the statute restraining foreign corporations from discounting notes in this state.

In an action upon such a note, evidence, that the foreign corporation to whom it was given was in the habit of discounting notes in this state, is inadmissible. To render such evidence proper, it must first appear that the note in suit was so discounted.

In an action upon such a note against the endorser by the endorsee of the corporation who made the advance upon it, it is no defence that the endorsement was made for a special purpose, and the note has been diverted therefrom, unless it also appear that the original holders were aware of the circumstances prior to making the advance.

APPEAL by defendant from a judgment entered on a report of a referee. This was an action on a promissory note against the defendant as endorser. The defence was three-fold.

1st. That the endorsement was made without consideration, and that the note was diverted from the purpose for which it was made.

2d. That the note was made by the makers, H. Wilbur & Co., and passed by them, with two other notes, to the Meriden

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Agency Company, upon the agreement that they were to furnish therefor, to the makers, bills of the City Bank of Cape May, New Jersey, of the denomination of one, two, three and five dollars, which bills were to be stamped so as to be recognized, and were to be kept in circulation by Wilbur & Co. until the notes were paid, and that this agreement rendered the notes void under the provisions of the Revised Statutes relative to unauthorized banking, contained in 2 R. S. (4th ed.), p. 118, and *post.*

3d. That it was discounted by the Meriden Agency Company, a foreign corporation; that they kept an office in the city of New York for the purpose of discounting paper; that this was contrary to the same provisions, and rendered the notes void.

The cause was tried before a referee, who reported in favor of the plaintiff. The following extract from his report states the facts material to the case.

“ I further find and report, that the said note was, together with two other notes, made by H. Wilbur & Co., and endorsed by the defendant, the three together amounting to six thousand dollars, delivered to the Meriden Agency Company, a corporation with banking powers, doing business in the state of Connecticut, in pursuance of an agreement made by and between Curtis L. North, the president of said company, and Henry Wilbur, of the said firm of H. Wilbur & Co., by which agreement the said company were to furnish to said Wilbur the amount of said notes, less a discount at the rate of six per cent. per annum, in the bank bills of the City Bank of Cape May, a banking institution situated in and doing business under the laws of the state of New Jersey, of the denomination of one, two, three and five dollars, which bills were current in the city of New York at a discount of one-quarter of one per cent., and were redeemed from time to time at the office of J. H. Washburn, in said city, the agent in said city of said Meriden Agency Company, the bills so to be furnished to said Wilbur to be marked and identified and circulated by him in the state of New York, and as fast as redeemed by said Washburn to be taken up by said Wilbur

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from time to time, with funds current at par in the city of New York; that this arrangement was to continue for one year, and the said notes, given by said H. Wilbur & Co., were to be renewed from time to time during said year; that the said notes were endorsed by the defendant, Cornell, without consideration, and for the accommodation of the makers, and with a view to said proposed arrangement. I further find and report, that the said arrangement was never executed, but the full amount of said three notes was paid to said Wilbur in funds of banks in the city of New York."

It further appeared by the evidence that the amount paid for the notes was equal to their face, that no interest was deducted, and that the payment was made after the notes had run some time. The note was passed to the present plaintiff by the Meriden Agency Company.

The defendant offered evidence to show that the Meriden Agency were engaged in the business of discounting paper as a business, in this state, in violation of the statute, but the evidence was excluded. Judgment was perfected on the referee's report in favor of the plaintiff, and the defendant appealed therefrom.

*John E. Burrill*, for the appellant.

I. The note was made, endorsed and delivered to the Meriden Agency Company in pursuance of an illegal agreement to circulate the bills of the City Bank of Cape May, under the denomination of \$5, in the state of New York, in violation of the statute, and was therefore void in the hands of that company, and of any persons claiming through them. *Prall v. Adams*, 7 Paige, 615; *Bank of Chenango v. Curtis*, 19 John. 826; 2 R. S. (4th ed.) 119, §§ 11, 12, 13.

II. The illegality of the contract, under which the note was made and delivered, was not waived, nor the contract legalized by the fact that the notes were subsequently otherwise paid for. *De Groot v. Van Duzer*, 20 Wend. 390-395.

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III. The note in suit was discounted by the Meriden Agency Company, in violation of the statute prohibiting foreign corporations from discounting notes within the state. 2 R. S. (4th ed.) 118, § 3-5, and 6-9; p. 698, § 2.

IV. The note was endorsed without consideration, and was diverted from the purpose for which it was given.

*William H. Leonard*, for the respondent.

INGRAHAM, FIRST JUDGE.—Three grounds of appeal are presented to us in this case:

1st. That the note was void because it was made in pursuance of an illegal agreement to circulate the bills of the City Bank of Cape May, in New Jersey, in violation of the statute.

2d. That the note was discounted by the Meriden Agency Company of Connecticut, in violation of the restraining act.

And, 3d, That the note was diverted from the purpose for which it was endorsed by the defendant.

I think it is a sufficient answer to the first objection, that, although such was the original agreement, it was never carried out. The notes never were delivered in pursuance of it, but, when the money was advanced, it was New York funds. Whatever agreement was afterwards made, as to the payment of those drafts, would not affect the right to recover the money advanced upon the notes as a loan.

That amount was a debt due to the company, and the transfer of the notes by the Meriden Agency Company to the plaintiff entitled them to receive the amount so loaned. The referee has found that the agreement originally made never was carried out by the parties, but that the full amount of the notes was paid in New York funds.

There was no discount of this paper at all. The Meriden Company advanced upon the notes a sum equal to the whole face of the notes, although they had some time to run before payment. In fact, they advanced more than the notes were worth, inasmuch as they must have lost the accruing interest from the

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Noble v. Cornell

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time of the loan to the day of payment. The statute does not prohibit the loan of money; it only applies to discounts of notes or evidences of debt. An advance upon a note of a sum of money equal to the face of it, without deducting any interest, or receiving any payment of interest, is not a discount of a note within the meaning of the statute.

The third objection is, I think, equally unavailing. Admitting that the defendant had endorsed the note under the agreement for circulating the bills, as stated, and that the passing of the notes to North, as security for a loan of \$6,000 upon them, was a diversion of the note that might relieve the defendant from liability, still, there is no evidence to show that North, prior to advancing the money for the Meriden Company upon the notes, had any knowledge that Cornell's endorsement was an accommodation endorsement, or that it was made on any such condition. So far as Cornell was concerned, the Meriden Company were *bona fide* holders for value, and as such they could transfer to the plaintiff all the rights they had, which entitled him to recover whether he was a *bona fide* holder or not.

I think, also, the questions put to the witnesses, as to the business of the Meriden Company in this city, were properly excluded. Inasmuch as there was no discount of the paper, the object of the evidence so offered became immaterial. Even if the evidence was admissible to show that the company were in the habit of discounting notes in New York, that evidence could not affect a note in their possession which had never been discounted by them. Before such evidence could, under any circumstances, be available to the defendant as a defence, it should appear that the note had been discounted by the company.

Judgment affirmed.

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McMahon, Jr., v. Allen.

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**DENNIS McMAHON, JR., Administrator, &c., v. THOMAS E.  
ALLEN.**

Leave will not be granted to file a supplemental complaint which alleges any fact known to the plaintiff at the time of commencing the action.

It is improper to join in one complaint prayers for relief against the defendant individually, and in his capacity as executor.

Leave to file a supplemental complaint will not be granted where the object can be accomplished by amendment.

**APPEAL** from an order denying a motion for leave to file a supplemental complaint. This action was brought by Dennis McMahon, jr., as administrator, with the will annexed, of Ruth S. Rathbone. John Harrison was, by the will of Ruth S. Rathbone, appointed her executor. He died, and Dennis McMahon, jr., the plaintiff, was made administrator, with the will annexed. The defendant, Thomas E. Allen, was the agent of John Harrison in his lifetime, and was appointed his executor upon his death. The object of this action was to compel the defendant, as agent of John Harrison, to account for the moneys received by him as such agent, on account of the estate of Ruth S. Rathbone. The defendant, though executor of John Harrison, was not sued as such by the original complaint.

On the trial before the referee, he was of the opinion that it was necessary, in order to procure a final accounting, to bring in the defendant in his capacity as executor; and upon his report to that effect, the plaintiff moved, at special term, for leave to file a supplemental complaint partly for that purpose. The proposed complaint also contained an allegation that, in April, 1850, which was shortly before the commencement of this suit, one Solomon Kipp, who had been trustee for the separate estate of Ruth S. Rathbone, assigned the trust estate to the plaintiff. And it prayed relief against the defendant both as agent and executor of John Harrison, and a final accounting from him in both capacities. The motion was denied at special term, and the plaintiff appealed.

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McMahon, Jr., v. Allen.

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*Dennis McMahon, jr.*, appellant, in person.

I. The defendant was not even entitled to notice of the motion for leave to file a supplemental complaint. If he has any objection, he could defend by answer or demurrer. Such was the old practice. *Pendleton v. Fay*, 3 Paige, 206; *Eager v. Price*, 2 Paige, 333; *Lawrence v. Bolton*, 3 Paige, 294; *Green v. Bates*, 7 How. Pr. R. 296. And it is applicable under the Code, being consistent therewith. Code, §§ 468 and 471.

II. Even were the defendant entitled to notice of the motion, he has no right to litigate on the motion the merits of the supplemental bill, such as whether there is any foundation for the original complaint, or whether there will be any foundation for the supplemental bill. Such matters can only be discussed on the final decree upon the original and supplemental bill, and the issues joined on them. *Pendleton v. Fay*, 3 Paige, 204; *Lawrence v. Bolton*, ibid. 294; *Doolittle v. Gookin*, 10 Verm. 265; *Carlton v. Carlisle*, 5 Madd. R. 427; *Welford's Eq. Pl.* 188, *et seq.*

III. All the court could inquire on this motion was, is there an apparent necessity for the supplemental bill under section 122 of the Code, taken in connection with sections 173 and 177, and 277 and 278.

IV. That apparent necessity is sufficiently shown by the opinion of the referee, *Buller v. Chauvil* (5 Russ. 42), which decision and recommendation was based on the similar action in an analogous case of *Coll v. Lasnier* (9 Cowen, 320), and opinion of Betts, Chancellor, on p. 334.

V. No prejudice could accrue to the defendant by adding the party, as the cause must stand or fall by the original bill. On the other hand, it benefits the plaintiff in preventing a circuituity of action, and enables the parties in this action to settle the entire controversy in one action. 10 Vermont, 265; *Johnson v. Snyder*, 7 How. Pr. R. 395; *Hornfager v. Hornfager*, 6 ibid. 13; *Beek v. Stephain and others*, 9 ibid. 193.

*Albert Mathews*, for the respondent.

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I. The granting or refusing the application to file a supplemental complaint rested in the sound discretion of the judge at special term, and the order made by him is not the subject of appeal. Code, § 177; *Rogers v. Hosacks, &c.* 18 Wend. R. 330; *Rogers v. Halsey*, *ibid.* 350; *Lansing v. Russel*, 4 Cow. S. T. R. 213; *Delaplaine v. Lawrence*, 3 Com. R. 301; *Gray v. Fox*, 1 Code R. 334; *Cook v. Dickinson*, 5 Sand. 663; *Thompson v. Starkweather*, 2 Code R. 41; *St. John v. West*, 3 *ibid.* 85; *Seely v. Chittenden*, 10 Barb. R. 303; *Perry v. Moore*, 3 Code R. 221; *Bryan v. Breenan*, 7 How. Pr. R. 359; *Dean v. Empire Mutual Ins. Co.* 9 *ibid.* 69; *Fitch v. Livingstone*, 4 Sand. R. 712; Voorhies' Code, 1855, § 349—note.

II. The gross *laches* of the plaintiff in making this application forbid its being granted. All the facts were known to him before filing his original complaint, except one, and that one was known to him in April, 1853. Code, § 177; *Pendleton v. Fuy*, 3 Paige, 204; *Rogers v. Rogers*, 1 *ibid.* 424; *Whitmarsh v. Campbell*, 2 *ibid.* 67; *Verplank v. Merchants' Ins. Co.*, 1 Edw. 46; *Pendrick v. White*, 1 Metcalf R. 67.

III. The proposed supplemental complaint is based upon new facts, upon which (if the plaintiff's theory be correct) a judgment may be had, without reference to the original complaint. The original complaint is wholly defective, and shows no cause of action against the defendant therein. In either case, the plaintiff should commence a new action. *Smith v. Edmonds*, X. Leg. Obs. 185; *Milner v. Milner*, 2 Edw. N. C. R. 144; *Lloyd v. Brewster*, 4 Paige, 538; *Byme v. Byme*, 2 Dunn. & Warren, 71; *Coleman v. McMurde*, 5 Randolph, 51.

When the plaintiff commenced suit he had no cause of action against any person—no executor having been appointed of the will of John Harrison.

IV. To entitle the plaintiff to file a supplemental complaint, it must be in respect of *the same title in the same person*, as stated in the original bill. Here it is totally different. It is a new case. Story's Eq. Pleadings, 339; *Tuckin v. Lethbridge*, Cooper's Cy. Cases, 43; *Pratt v. Bacon*, 10 Pick. R. 222.

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V. The claim against the defendant, as executor, is a claim "against a trustee," and cannot be united with a claim against him individually. Code, § 167; *Dix v. Backerstone*, 12 Wend. 543.

1. The causes of action are wholly distinct, and the proposed complaint multifarious. *Davoul v. Fanning*, 4 John. Cy. R. 199; *Butts v. Greening*, 5 Paige, 254; *Murray v. Hay*, 1 Barb. Cy. R. 59; *Jackson v. Forrest*, 2 ibid. 576; Story's Eq. Pleadings, 274 (a).

VI. If the supplemental complaint were allowed, it could only be on payment of costs of motion and appeal, and all costs subsequent to issue. *Downer v. Thompson*, 6 Hill, 377; *Holmes v. Linsing*, 1 John. Chy. Cases, 248; *Teraking v. Engel*, 1 How. Pr. R. 5; *Travis v. Hadden*, ibid. 57; *Warren v. Campbell*, ibid. 61; *Coffing v. Tripp*, ibid. 115; *Lignes v. Noble*, ibid. 226; *Tomlinson v. Wiley*, ibid. 247; *Bank of Chillicothe v. Dodge*, 2 Pr. R. 43; *Carvier v. Della*, 3 Pr. R. 173; *Brown v. Babcock*, 3 Pr. R. 305; *People v. Holmes*, 5 Wend. R. 191.

BRADY, J.—It would be sufficient, perhaps, to state that the motion, on which the order appealed from was made, was for leave to file a supplemental complaint containing one material allegation at least which was known to the plaintiff when this action was commenced, namely, that he had been made the assignee of the trustee, Solomon Kipp, in the manner and by the authority for that purpose, and to the end set forth in such allegation, which was an objection to the leave sought by the motion. The section of the Code (177) allowing parties litigant, on motion, to make supplemental pleadings, applies only where the facts occur *after* the former pleading, or where the party *was ignorant of them* when such former pleading was made. *Houghton v. Skinner*, 5 How. Pr. R. 420.

There is, however, another objection to such complaint, and that is, that it prays relief against the defendant in his individual capacity and as executor of John Harrison, deceased; not in express terms, it is true, but in language sufficiently broad for that

purpose, praying as it does "that this court may settle the *whole controversy now subsisting between the plaintiff and the defendant*," and that, too, after an allegation, which is new, that the defendant, since the commencement of this action, became such executor. There is no doubt that this action cannot be maintained against the defendant individually and as an executor. "His rights," as said by Judge Woodruff, "in these separate characters are distinct, and his relations to this plaintiff, as well as to those who are interested in the estate of his testator, are distinct." Besides this, the judgment would be different in many respects, and the rule as to costs dependent not on the plaintiff's success alone, which would follow if the defendant were sued as an individual, but on the conduct of the defendant, or on reference to the special circumstances contemplated by the statute relative to that subject.

Again, it seems to have been the well settled rule in equity, that leave to file a supplemental complaint was never granted where the object could be accomplished by amendment. 1 Vol. Hoff. Ch. Pr. 393; 1 Smith's Ch. Pr. 526; Mitford's Pl. 60. And, in courts of common law jurisdiction, the defect of a pleading was always cured by amendment, when the amendment was proper and allowable.

The allegation of the plaintiff's character, derived from the assignment by Kipp, is a fact which was known, as stated, when this action was commenced, and would have formed the subject of amendment under either of the old systems, but could not have been averred by way of supplemental bill in equity.

It is not necessary to consider the various questions involved in the points submitted on the appeal, the objections already stated to the relief asked by the motion being sufficient to sustain the order of Judge Woodruff, and that order must be affirmed, with \$10 costs.

Order affirmed.

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Poock v. Miller.

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LUDWIG POOCK v. LOUIS MILLER.

In an action against a husband for clothing furnished to his infant children, the opinion of a witness that they were necessary for them is not sufficient evidence of that fact. The circumstances which rendered the furnishing of the goods necessary should be shown.

To sustain such an action, it must appear that the articles supplied were furnished with the assent, or by the authority of the father, or to keep the children from absolute want, or that there was absolute necessity for them.

APPEAL by plaintiff from a judgment of the Fourth District Court. This action was brought by the plaintiff as assignee of one Frederick Wellmann, to recover for clothing furnished to the infant children of the defendant. The plaintiff proved that the goods were delivered to the minor children of the defendant; that the prices charged were reasonable and fair prices, and the assignment of the claim to the plaintiff; and one of the witnesses (the assignor of the claim) testified that "the clothing was necessary for the sons of the defendant." On this evidence he rested. The justice dismissed the complaint, and the plaintiff appealed.

*James McGay*, for the appellant.

*Niles and Bagley*, for the respondent, cited, in support of the position that the evidence was not sufficient to warrant a recovery, the following cases: *Varney v. Young*, 11 Verm. 258; *Hunt v. Thompson*, 3 Scaman, 179; *Angel v. McLellan*, 16 Mass. 28; *Mortimer v. Wright*, 6 Mees. & W. 482; *Van Valkenburgh v. Watson*, 13 John. R. 480; *Baker v. Keen*, 2 Stark. R. 501.

BRADY, J.—The justice did not err in granting the nonsuit. The evidence was not sufficient to charge the defendant for the clothes furnished his children. Proof by the witness, Wellmann, that they were necessaries does not establish that fact legally, in reference to the liability of the parent. Clothing is

## COURTOIS v. HARRISON.

necessary, but whether any particular clothing is necessary or not depends wholly upon circumstances, which should be shown. If the defendant provided sufficient clothing for his infant children, then that furnished by the plaintiff was not necessary in legal contemplation, and no recovery could be had for it on the mere statement of a witness to the contrary.

It is not sufficient to charge the parent to show that the children supplied were minors, and that the articles furnished were necessary articles. Some assent or authority, by or from him, must be shown (Story on Con. § 70, and numerous cases there cited; 1 Vol. Parsons on Contracts, 253), unless there is proof that the articles sold were delivered to the infants to keep them from absolute want, or that there was absolute necessity for their use. No evidence of either of these elements appears in the return.

A parent is under a natural obligation to furnish necessaries for his infant children, and, if he neglects to do so, a person who supplies them confers a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of such parent. But what is actually necessary will depend on the precise situation of the infant, and *which the party giving the credit must be acquainted with at his peril*—(Van Vulkenburgh v. Watson, 13 John. 480)—and must prove to maintain his action.

Judgment affirmed.

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HECTOR COURTOIS v. L. F. HARRISON, Treasurer of the Young Men's Democratic Union Club.

In supplementary proceedings, the judge at chambers, before whom the order is returned, may vacate it on motion of the summoned party, if the affidavit on which it is founded is insufficient, or if for any reason it appears to have been improvidently granted.

## Courtois v. Harrison.

It is too late, after judgment against a defendant as treasurer of a joint stock association, and in supplementary proceedings to enforce the payment of the judgment, to raise the objection that they are not such an association within the meaning of the statute.

Nor can this court, in such proceedings, founded upon a judgment of the Marine Court, go behind the record, and take into consideration affidavits, or the judge's certificate, that he ordered judgment against the defendant individually, and that it was entered against him as an officer of such association by mistake. If such an error has been committed, application for relief must be made to the court in which the judgment was rendered.

Proceedings supplementary to execution, under § 294 of the Code, may be taken, to compel the treasurer of a joint stock association to submit to an examination, upon the allegation that he is indebted to it, though the judgment is entered against him as treasurer of such association, and the action was commenced by the service of summons upon him under the act of 1849.

APPEAL from an order dismissing an order for the examination of a debtor of a judgment-debtor in supplementary proceedings. The plaintiff recovered a judgment in the Marine Court, which was entered there, and subsequently docketed against L. F. Harrison, Treasurer of the Young Men's Democratic Union Club. Execution was issued upon the judgment. While it was still in the hands of the sheriff, the plaintiff, on the usual affidavit, that L. F. Harrison had property of the defendant's in his possession exceeding \$10 in value, obtained an order for his examination. Upon the return of this order Harrison moved to dismiss it, and to sustain the motion offered in evidence an affidavit and the certificate of the judge who tried the cause, for the purpose of showing that on the trial it was objected that the Young Men's Democratic Union Club did not constitute a joint stock association, within the meaning of the act of 1849, and that no action could be maintained against L. F. Harrison *as treasurer thereof*. That the objection was sustained, but that the judge ordered judgment against L. F. Harrison personally. These papers the judge before whom the motion was made refused to consider. But he dismissed the order upon the ground that the provisions, as to supplementary proceedings, did not apply to the case of a judgment against a joint stock association. From this order the plaintiff appealed.

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Courtois v. Harrison.

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*Louis H. Pignolet*, for appellant.

*Edw. W. Cone*, for respondents, cited *Morgan v. N. Y. and Albany R. R. Co.*, 10 Paige, 290; *Hinds v. Niagara Falls R. R. Co.*, 10 How. Pr. R. 487, to the proposition that supplementary proceedings could not be taken against a corporation.

INGRAHAM, FIRST JUDGE.—The plaintiff recovered against the defendant a judgment in the Marine Court, under the statute of 1849, chapter 258, and filed a transcript with the county clerk. After issuing an execution, he commenced supplementary proceedings to enforce the payment thereof. The order obtained was against L. F. Harrison, as a person having property in his possession of the judgment-debtor's exceeding in value \$10. On the return of the order, the judge at chambers, on defendant's motion, discharged it, from which the plaintiff appeals.

There is no force in the objection, that the judge could not, on the papers, discharge the order. These orders are granted *ex parte*, and the first opportunity the defendant has to be heard is on the return of the order. If the affidavit on which the order was granted was insufficient, or if for any cause the order was improvidently made, the judge ought to vacate it, and it is the right of the defendant to have such a motion under such circumstances granted.

There may be some doubt whether the Young Men's Democratic Club is a joint stock company or association within the meaning of the statute. It can hardly be contended that every political association or committee is to be considered a joint stock association. But whether it is so or not, it is too late for the defendants in this proceeding to raise the objection. It should have been done on the trial, and, if overruled there, the defendants should have appealed. Not having done so, the judgment on this proceeding is conclusive against them.

It is said, however, that the judge did so decide, and ordered judgment against the defendant Harrison individually, and affidavits and the judge's certificate to that effect are submitted.

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The judge rightly disregarded these papers. If the judgment was erroneously entered up in the Marine Court, we cannot go behind that judgment and correct errors which can only be done by that court. The defendants must apply to the Marine Court for relief. The only question, therefore, that is of any importance on this appeal is, whether this proceeding can be resorted to upon a judgment recovered against a joint stock association under the statute of 1849.

It is settled, that if the judgment was against a corporation, the remedy by supplementary proceedings is improper, and that the plaintiff should resort to the remedy provided by the Revised Statutes. *Hinds v. The Canandaigua and Niagara Falls R. Co.*, 10 How. Pr. R. 437.

The judgment in this case is not against any individual. It is against the club only as a joint stock association. The members of that club are not defendants, any more than stockholders in a corporation are defendants when the action is brought against the corporation. They are not personally liable, nor can their individual property be reached by such a judgment. If it were otherwise, it would be a very unnecessary provision in the act to reserve to the plaintiff the right to proceed against the individual members, as is prescribed in the fourth section. The insertion of the name of the treasurer as defendant does not make him in any way responsible, but merely provides for commencing the action in the same way as the free banking statute directs that actions may be commenced against the president of the institution as such. In neither case does any personal liability attach to the individual. This proceeding, then, is under the 294th section of the Code. It does not limit the remedy to any county in which the debtor resides, nor is it required that it should appear in the affidavit that the execution has been issued to the sheriff of such county. Such has been the construction given to this section in *The People v. Norton* (4 Sand. S. C. R. 640).

The reasons assigned by the court, why proceedings cannot be taken under section 292 against the corporation, have no appli-

## Courtois v. Harrison.

cation to section 294. The judge says that section 292 "provides for the order when the execution has been issued to the county where the debtor resides, &c. This evidently refers to a judgment against a natural person, who has, or is capable of having a residence, &c." "A corporation, being a mere artificial being, can have no residence; and this jurisdictional fact can never be shown in the case of an execution against such a defendant."

In section 294, no such jurisdictional fact is necessary, and there is no difficulty in complying with all the requisites of that section against a corporation or joint stock association, as well as against individuals. The case is a stronger one also against joint stock associations, because the provisions of the Revised Statutes as to the sequestration of the property do not apply to any other bodies than corporations; and if this section is held to be inapplicable to such associations, there is no means of enforcing the payment of such judgments except by execution.

It is said that Harrison, against whom the order was made, is a defendant, and therefore not subject to such an examination. I have already remarked that the individual members are not defendants, and cannot be proceeded against as such. Any one of them who holds the property of the association may, I think, be examined, whether named as an officer or not. The object is, to ascertain the property of the association, not of Harrison, and the examination should be confined to that limit.

I think the order appealed from should be reversed, and the witness be required to submit to an examination.

As the question is new, no costs should be allowed on this appeal.

Order reversed.

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Lewando v. Dunham and Dimon.

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**ADOLPHUS LEWANDO v. THOMAS DUNHAM and FREDERICK DIMON.**

Every action should be prosecuted in the name of the real party in interest; and where the action was brought by an assignor of the original claimant, and the evidence showed that another person was to share in the proceeds of the judgment, *held*, that the complaint should have been dismissed, although the assignment to the plaintiff was in writing and under seal.

APPEAL by defendants from a judgment of the Marine Court. This action was brought by the plaintiff, as assignee of one C. Broglie, to recover the value of a trunk and contents from the defendants, who were owners of the ship "Harmonia," on board which it was shipped by C. Broglie at Havre, to be carried to New York, it never having been delivered there. The assignor being placed on the stand as a witness, proved an assignment in writing and under seal, by himself to the plaintiff; but, upon cross-examination, testified that he received \$100 as the consideration for the assignment, and that the plaintiff and the assignor's brother-in-law were to have one-half of the judgment. The defendant's counsel moved to dismiss the complaint, upon the ground that the action was not brought in the name of the real party in interest. The motion was denied, and judgment having been rendered for the plaintiff, the defendants appealed on that and other grounds.

*Charles H. Hunt*, for the appellants.

*John O. Robinson*, for the respondent.

BRADY, J.—Broglie, the assignor, stated, on his cross-examination, that he received, as a consideration for the assignment of his claim against the defendants, the sum of \$100, and that the plaintiff, to whom the claim was assigned, and the assignor's brother-in-law were *to have one-half of the judgment*. The de-

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fendants moved for a nonsuit, on the ground that the action should have been brought in the name of the real parties in interest. The objection was well taken, and the complaint should have been dismissed.

The assignment to the plaintiff was under seal, it is true, but no objection to the examination of the assignor on this branch of the case was taken, and the plaintiff is concluded by his answers.

We have decided in *Hastings v. McKinley* (1 E. D. Smith, 273), that whether the plaintiff's title be legal or equitable, if he have the whole interest he may maintain an action. The plaintiff had not the whole interest. He and the brother-in-law of the assignor were to have one-half of the judgment. The witness did not state that each was to have one-half of the judgment, and may be understood to have meant one-half of the judgment to them collectively, reserving the other half to himself. However this may be, it is clear that the plaintiff had not the whole interest, and that this action could not be maintained in his name.

Sections 111 and 113 of the Code do not contain any class of exceptions which will save the plaintiff's case in this respect. The contract was not made for the benefit of the assignor's brother-in-law exclusively, but for his benefit and the benefit of the plaintiff; thus creating a joint interest in the recovery, and not an interest for the brother-in-law in the name of the plaintiff.

If the plaintiff could be regarded, as to the brother-in-law's interest, a trustee of an express trust within section 113, this action could not be maintained in its present form. The plaintiff's recovery must be *secundum allegata*, and he has made no allegation of any other than an individual claim against the defendants.

This view being fatal to the judgment, it is not necessary to consider the other questions presented, and the judgment must be reversed.

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Murling v. Grote.

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**FERDINAND MURLING v. WILLIAM GROTE.**

Where the justice disposed of the business before him, and a defendant who was waiting asked for the cause in which he had been summoned, and was informed by the justice that he had no such cause, and he thereupon left the court, *held*, that the plaintiff could not afterwards proceed with the cause in the defendant's absence.

APPEAL by defendant from a judgment of the First District Court, entered against him by default. The facts appear in the opinion of the court.

*William M. Sniffin*, for the appellant.

*S. Bennett Ackerman*, for the respondent.

INGRAHAM, FIRST JUDGE.—In this case, on the return of the summons, the parties appeared, and after the justice had called his cases, the defendant's counsel applied for this case, and was informed by the justice that he had no such case, as all the cases had been called and disposed of, and thereupon he left the court with his witnesses. Afterwards the papers were found, and the case was adjourned to another day. The plaintiff's attorney made oath that he had served, on the defendant's attorney, a notice of the adjournment. This is denied by the defendant's attorney, who states he had no notice of any adjournment. On the adjourned day the plaintiff took a judgment by default.

I am not satisfied that the justice had any authority to proceed in the case after dismissing the defendant. On the contrary, after the defendant has appeared and been dismissed by the court, the safer course is to serve a new summons. If the practice is sanctioned which was adopted in this case, it will open a door to great frauds in the service of notices, from which no relief can afterwards be obtained, for want of power in the court below to open a judgment obtained by improper means.

Judgment reversed.

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Gelhaar v. Ross.

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**PHILLIP GELHAAR v. GEORGE ROSS and M. M. STANIELS.**

Parol proof of the contents of a chattel mortgage having been given upon the trial without objection, *held*, that the objection could not be taken upon appeal.

The interest of a mortgagor in chattels, before default, may be levied on and sold under execution. But where, after default in the mortgage, it is foreclosed, and the property passes into the possession of the mortgagee, the officer becomes a trespasser, if he sells the property and delivers possession to a third person, and is liable in damages to the mortgagee therefor.

When a defendant seeks to justify the taking of personal property under an execution against a person other than the plaintiff, it is not sufficient to produce the execution; the judgment on which it was issued must also be proved.

**APPEAL** by the defendants from a judgment of the Seventh District Court. This was an action to recover damages for the unlawful taking of personal property. The defendants justified the taking under an execution against William Gelhaar. The evidence showed that William Gelhaar was the original owner of the property, which consisted of the contents of a drug store. That he gave a chattel mortgage upon it to Phillip Gelhaar on the 4th of December, 1855. That on the 17th of December an execution was issued out of the Sixth District Court against William Gelhaar in favor of the defendant George Ross, and was levied by the defendant M. M. Staniels, a constable of the city, on the property in question on the 19th of December. The goods were not, however, removed from the store. At the time of the levy the mortgage was due; the mortgagee was in possession of the property, and had taken proceedings to sell it. These facts were known to the constable at the time of the levy. On the 3d of January, 1856, they were sold under the chattel mortgage by Phillip Gelhaar, and bought in by him, and on the following day, the defendant Staniels having been indemnified by Ross, they were sold by him under the execution. They were subsequently purchased back by William Gelhaar for \$30, for which sum the justice gave judgment. There was no proof of the judgment on which the execution was issued, nor was the chat-

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tel mortgage under which the plaintiff claimed title produced, but no objection was made to the parol proof offered of its existence and contents.

*William R. Stafford*, for the appellants.

*Diefendorf and Acker*, for the respondent.

**INGRAHAM, FIRST JUDGE.**—The plaintiff claimed title to personal property under a mortgage. Upon the trial parol proof of the contents of the mortgage was given, without objection on the part of the defendant. He cannot, therefore, now make an objection which should have been stated to the justice at that time. If it had been taken on the trial, the objection could have been obviated, probably, by producing the original mortgage. The rule is well settled, that such objections are of no avail unless made at the trial. On this account the motion for a nonsuit was properly denied.

There is no doubt that the interest of the mortgagor, before default in the payment of the mortgage, may be levied on and sold by the sheriff or constable. 1 Com. 295; 1 Kiernan, 501, and cases there cited. There is no evidence that such was the present case. On the contrary, the evidence shows that the money secured by the mortgage was due, and the plaintiff had taken measures to foreclose the mortgage, and was in possession of the property, before the levy, of which the officer had notice. He was therefore legally in possession of the property, and the officer as well as the party, having full knowledge of these facts, became trespassers when they sold the property and delivered possession to third persons. They might have sold the interest of the mortgagor, but after default in the mortgage, and possession on the part of the mortgagee, and knowledge thereof by the parties, they could not legally go further.

There is also a more serious objection to the defendants' appeal, viz., that the evidence was not sufficient to make out any justification. Both in the answer and the evidence, they attempt

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to justify on the ground that the goods were sold under an execution. The proof necessary to sustain such a defence, when it appears that a stranger has title and possession of the property, is not complete by merely producing an execution, but the defendant must also prove the judgment under which the execution was issued. *High v. Wilson*, 2 J. R. 46; *Parker v. Walrod*, 16 Wend. 517. No such evidence was offered, and the justification in this respect failed. The plaintiff was entitled to recover any damages he sustained by having the property taken from him.

The defendants cannot complain that the justice erred in adopting the lowest value as the amount of the damages. If the plaintiff is satisfied, the defendants ought to be also.

Judgment affirmed.

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**JOHN STEWART and others v. THOMAS B. SMITHSON and others.**

In an action to restrain the defendants' use of the plaintiffs' trade-mark upon an article intrinsically valuable, it is no defence that the trade-mark in question is a false and fraudulent one, used by the plaintiff with intent to deceive, and that the article which is accompanied by it is not what the trade-mark indicates it to be. In such an action the trade-marks containing these words respectively:—one of them, "H. & M.'s" patent thread, Barnsley," and the other, "G. & W.'s celebrated patent thread, Berwick," held, that it was no defence that the threads were not patented, and were not made by the persons whose names they bore, nor by their assignees or successors, nor at the places designated on the trade-marks, but that the trade-marks were false and fraudulent; and a motion to amend the answer, by inserting allegations to that effect, was properly denied.

**APPEAL** from an order at special term, denying a motion for leave to amend an answer. This action was brought to enjoin the defendants from using the plaintiffs' trade-mark, and for an accounting.

The complaint alleged that the plaintiffs were the manufacturers of a linen thread, called "Hall and Moody's patent

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thread," and marked "Barnsley," which was well known in the market by that name, and to which a trade-mark of that name was attached, which belonged to them, and which they had used for a number of years. Also, that they were the manufacturers of another kind of thread, called "Grant and Wilson's celebrated patent thread," and marked "Berwick," to which that name was appended as a trade-mark, and by which it was well known in the market. It also averred that the defendants were using the plaintiffs' trade-mark to their damage—selling an inferior thread, and at a lower price, but marked in the same way.

The answer consisted mainly of a denial of the allegations in the plaintiffs' complaint, accompanied with averments that the thread which the defendants sold was manufactured by F. W. Hayes & Co., in Ireland, and was sent to them, and sold by them as agents of Hayes & Co.

After issue joined, the defendants moved to amend their answer by adding the following allegations:

"And the defendants, on information and belief, state that the mark claimed by the plaintiffs, and set out in the third section of the complaint, viz., 'Hall and Moody's patent thread, Barnsley,' was, and is a false and fraudulent mark, used by the plaintiffs with intent to deceive and defraud, and that the thread containing said mark, sold, or kept for sale, by the plaintiffs, was not and is not patent, and that no patent for said thread has ever existed. Nor was said thread manufactured by Hall and Moody, nor by any person or persons, their assignees or successors; nor was said thread manufactured at or brought from Barnsley—all which the plaintiffs well knew."

And also the following allegations as to the trade-mark called "Grant and Wilson's celebrated patent thread, Berwick," viz.:

"And the defendants, on information and belief, say that the mark claimed by the plaintiffs, and set out in the ninth section of the complaint, viz., 'Grant and Wilson's celebrated patent thread, Berwick,' was, and is a false and fraudulent mark, used by the plaintiffs with intent to deceive and defraud, and that the thread containing said mark, sold or kept for sale by the

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plaintiffs, was not, and is not patent thread, and that no patent for said thread has ever existed. Nor was said thread manufactured by Grant and Wilson, nor by any other person or persons, their assignees or successors; nor was said thread manufactured at or brought from Berwick—all which the plaintiffs well knew."

A number of affidavits were introduced on the part of the plaintiffs, on the motion, for the purpose of contradicting these allegations; but their consideration is not necessary here, inasmuch as the motion was denied upon the ground that the proposed amendments constituted no defence. From the order denying the motion the defendants appealed.

*Robert Gillen*, for appellants.

*Martin and Smiths*, for respondents.

BRADY, J.—The defendants, in the amendments which they asked leave to make to their answer at special term, have not alleged sufficient facts to constitute a defence. The mere fact that names used on a trade-mark are fictitious would not authorize the use of it by strangers. The question to be determined in these cases is, whether the mark used by the party claiming the protection of the court is owned by him, without regard to its form, which such party has a right to design according to his judgment or his fancy. If the defendants had alleged that the firm names used on the marks never existed, that would, for the reason stated, furnish no justification for their use of it, and it would not have presented a defence in this action. They have not done so, however, nor have they alleged that firms, whose names do appear on the mark, did exist, and that the use of their names by the plaintiffs was wholly unauthorized. If they had alleged this, then, in the application of the maxim *potior est conditio defendantis*, the courts might relieve them from any disturbance by the plaintiffs. The amendments offered do not contain anything meritorious, as suggested by

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Judge Woodruff, and do not contain a strictly legal answer to the plaintiffs' claim. This is a sufficient reason why the favor of the court should not be extended to them, and the order of the special term must be affirmed.

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CHARLES L. STEWART *v.* FERDINAND H. BOCK and others.

In an action to recover the price of goods sold and delivered, the defendant may show that the goods sold were, by the contract, to be delivered in good shipping order, and, upon a breach of that contract on the part of the plaintiff, may recoup damages therefor.

APPEAL by defendants from a judgment of the Marine Court. The facts sufficiently appear in the opinion of the court.

*Allan Melville*, for the appellants.

Submitted without argument by the respondent.

INGRAHAM, FIRST JUDGE.—The plaintiff sued the defendants to recover for a balance due for goods sold. Upon the trial of the cause, the defendants offered to prove that the goods sold were to be delivered in good shipping order, that they were not so delivered, that they were of less value on account of such bad condition, and that the defendants did not discover the unfit condition until it was too late to return them.

The justice rejected the evidence, upon the ground that it was no defence in an action for the price.

It is too late now to deny the right of the purchaser of goods to recoup damages when sued for the price of the goods, if they are not according to the contract. This was settled so long ago as *McAllister v. Read* (4 Wend. 483; 8 Wend. 109; 22 Wend. 155; 3 Hill, 171; 5 Hill, 63). This was the law before the

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Code, and the provisions of that statute have extended the right of the defendant, by way of counter-claim, to any cause of action arising out of the contract or transaction set forth in the complaint as the cause of action, or connected with the subject of the action—as well as to any other cause of action arising on contract. § 150.

It is not necessary to decide how far the provisions, as to a counter-claim, apply to justices' courts, because the right to recoup damages to the extent of the plaintiff's claim existed before the Code, and is not repealed; and although it may be that these courts have not the power to give the defendant a judgment for a balance on such claims, still, he may show that by reason of such damages the plaintiff should recover nothing from him.

The court below erred in excluding the evidence, and the judgment must be reversed.

Judgment reversed.

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**DAVID DAVIDSON v. RUSHMORE G. HUTCHINS and others.**

A judgment of the Marine Court will be reversed when the suit has been commenced by short summons, and there is no proof returned to this court of the defendants' non-residence.

In an action against two defendants, as partners upon a note made in the firm-name, the admission by one defendant of the partnership, and of the making of the note, is not sufficient evidence to sustain a judgment against the other.

In an action by an endorsee against the makers of a promissory note, the plaintiff must prove the endorsement to himself.

**APPEAL** by defendants from a judgment of the Marine Court. This action was brought against Rushmore G. Hutchins and Pomeroy Sawyer, as joint makers, and S. S. Rowland, as endorser, of a promissory note. It was commenced by short summons. The return of the justice did not disclose that there was any evidence of the defendants' non-residence. On the

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return day they failed to appear, and judgment was taken by default on the testimony of one Peter Starr, who testified that the defendant Hutchins admitted that he and the defendant Sawyer were partners, and made the note, and that he promised to pay it. It did not appear that the witness was the agent of, or acting for the plaintiff at the time of the conversation between himself and Hutchins. He stated the amount due on the note, principal and interest, to be two hundred and ninety-four dollars and eleven cents. This was all the evidence. The judge rendered judgment against the defendants for the sum of two hundred and ninety-four dollars and eleven cents, besides costs. The defendants appealed.

¶ *William A. Boies*, for the appellants.

I. The defendants failing to appear, the plaintiff was bound to prove *every fact* essential to establish his cause of action. Code, § 64, subdivision 8; *Cudner v. Dixon*, 10 Johns. (106) 110; *Muscott v. Miller*, 6 L. O. 423; *Smith v. Falconer*, 1 C. R. 120; 2 Sand. S. C. R. 640.

It was necessary to the plaintiff's case to prove the partnership of Hutchins and Sawyer—the execution of the note by them, and the endorsement by Rowland. The plaintiff failed in *each* particular. (a) There was no evidence of the partnership of Hutchins and Sawyer. The admissions of Hutchins could not be received as evidence of a partnership between Hutchins and Sawyer. A partnership must first be proved *aliunde*, in order to make the declarations of a partner (*as a partner*) admissible in evidence. It was error to receive the admissions of Hutchins on that point, and it was error to regard such admissions as evidence. 1 Greenleaf on Evidence, § 177; *McPherson v. Rathbone*, 7 Wend. 216; *Tuttle v. Cooper*, 5 Pick. 414; *Robbins v. Willard*, 6 ibid. 464; *Whitney v. Ferris*, 10 Johns. 66. (b) It was necessary to prove that Hutchins and Sawyer were partners *at the time* of the making of the note. Even the admissions of Hutchins do not show this. The evidence is, that

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Hutchins admitted to Starr that they were partners. *Camden v. Anderson*, 5 T. R. 709. (c) The making of the note by Hutchins and Sawyer was not proved. The declarations of Hutchins could not be received as proof of the making of the note by Hutchins and Sawyer *jointly*. (See authorities cited [under a] above.) And as the plaintiff sued upon a joint claim, if he failed to make out such, he must fail altogether. (d) There was no evidence of the endorsement by Rowland. Rowland was not served with process, and there was no pretence that he was a partner.

II. The summons in this case was tested Aug. 14, and made returnable the 17th.

The court had no authority to issue a short summons. The defendants not appearing, *the court obtained no jurisdiction*. It was the duty of the court to have dismissed the case. It was error to render judgment. *Sperry v. Major*, 1 E. D. Smith's R. 361; *Jackson v. Whedon*, ibid. 141; *Bray v. Andreas*, ibid. 387; 2 R. S. (4th ed.) page 430, § 14, and page 460, and cases there cited.

III. Judgment was rendered for \$305.48, including costs. The amount attempted to be proved due was only \$203.61 principal, and fifty cents interest.

Judgment was therefore rendered for over \$100 more than there was *any proof* of being due the plaintiff.

*Starr and Ruggles*, for the respondent.

DALY, J.—This judgment must be reversed upon several grounds. 1. The process was by short summons, and there was no proof that the defendants were non-residents. *Sperry v. Major*, 1 E. D. Smith, 361. 2. There was no proof that the makers of the note were partners. The admission of the defendant Hutchins could not be received to bind the defendant Sawyer; and, beyond his admissions, there was no evidence offered of the making of the note. 3. The note was made payable to the order of the defendant Rowland, and there was no evidence that

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he had endorsed it, or of any title to it in the plaintiff. 4. Starr, the only witness examined in the case by the plaintiffs, testified that the amount due upon the note was \$208.61, and the justice gave judgment for \$294.11.

Judgment reversed.

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### JASPER F. CROPSEY v. CORNELIUS MURPHY.

Anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another is a private nuisance.

~~A~~ fat-boiling establishment is a nuisance within the meaning of this rule, if it infect the air with noisome smells, or with gasses injurious to the health.

Proof that the plaintiff cannot enjoy his property in a full and ample manner by reason of the acts of the defendant—as, for example, that he cannot find tenants for his house on account of the noisome odors produced by the nuisance complained of—is sufficient proof of special damage to sustain an action to recover compensation therefor.

Although the damages awarded in such an action by the court below (in this case, the Marine Court) may seem to be excessive, this court will not disturb the judgment on that account.

APPEAL by defendant from a judgment of the Marine Court. This action was brought by the plaintiff, the owner of a house in Forty-fourth street, between the Ninth and Tenth avenues, to recover damages for injuries occasioned by a fat-boiling establishment belonging to the defendant, and situated on the adjoining lot. It appeared by the testimony of John Van Wagoner, the plaintiff's agent, that the house had previously been leased at \$59 per month, but that, after the defendant's fat-boiling establishment was placed there, he found it impossible to lease it, and the house remained in consequence, to a large extent, unoccupied. There was also evidence from a number of witnesses, including former tenants of the plaintiff, of the unpleasant and unhealthy odors coming from the establishment. The defendant's counsel moved for a nonsuit, alleging, as his grounds, 1st,

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That no cause of action was shown; and, 2d, That no special damage was proven. The motion was denied, and an exception was taken. Some evidence was offered on behalf of the defendant, contradicting that of the plaintiff, to show that the place was orderly and well kept; but evidence to the contrary was given by the health inspector and the alderman of the ward, as well as a number of other witnesses on the part of the plaintiff. Judgment for \$250 and costs was rendered in his favor. The appeal was submitted on the return without argument.

*Doheny and Hurley*, for the appellant.

*James Gridley*, for the respondent.

BRADY, J.—This was an action brought to recover damages for an alleged nuisance, created by boiling fat, and the justice rendered judgment for the plaintiff, assessing his damages at \$250. But one exception was taken on the trial, and that to the decision of the justice denying a nonsuit. The motion for a nonsuit was founded on two reasons:

*First*, No cause of action shown; and,

*Second*, No special damages proven.

Nuisances are of two kinds—public, or common nuisances, and private nuisances. Private nuisance may be defined to be anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. 3 Bl. Comm. 215. Nuisances to one's dwelling house are, all acts done by another which render the enjoyment of life within the house uncomfortable, whether it be by infecting the air with noisome smells, or with gases injurious to health. 2 Greenleaf's Evidence, page 467, citing several authorities. In proof of damages, it is sufficient for the plaintiff to show that, by reason of the injurious act or omission of the defendant, he cannot enjoy his right in as full and ample a manner as before, or that his property is substantially impaired in value. Where the damages are consequential, or affect relative rights, some damage must be proved. 2 Greenleaf, *supra*,

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pp. 473 and 472, and cases cited. The proof in the court below was abundantly sufficient to establish the requirements of the law, and the cause of action was proved. The special damage which the defendant insisted should be shown, was shown by John Van Wagoner, the first witness examined, and the justice would have erred to have granted a nonsuit.

This is the only question presented on the return, the finding of the court being upon questions of fact merely. The damages seem to be excessive, but the judgment will not be disturbed for that reason. *Pierce v. Dart* (7 Cowen, 609) was a *certiorari* from a justice's court, where the plaintiff sued for damages occasioned by defendant's building a fence across a public highway, near the residence of the plaintiff. He complained that he had received special damage.

The court, in conclusion, say, that the plaintiff was certainly put to some expense. True, the injury was trivial, and it is not difficult to see that the damages are excessive. But we cannot interfere on that ground, where the action below is for a tort.

Judgment affirmed.

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#### JOHN W. VAN HASSELL v. ISAAC P. BORDEN.

A mortgagee, holding a chattel mortgage, which provides that the mortgaged property shall remain in the custody of the mortgagor until default is made in the payment of the mortgage, cannot take possession of the property before such default, without showing some disposition of the property, by the mortgagor, calculated to destroy the security afforded him by the mortgage.

The owner of personal property, not in his possession, may transfer his right thereto to another, who may, on demanding possession of it, recover its value in an action, if the demand is not complied with. But such a demand is essential to give a right of action.

*It seems*, that a certified copy of a chattel mortgage is admissible in evidence with like effect as the original, where the original is upon file.

APPEAL by defendant from a judgment of the Second District Court. This was an action to recover damages for the unlawful

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detention of personal property. The plaintiff, in January, 1855, sold the property in question, which consisted of the stock and fixtures of a store, in the basement of the building corner of Pearl and Fulton streets, to Hans Martens, and to secure a part of the purchase money took back from him and his partner, Edward Hanschedt, a chattel mortgage on the property. This was made conditional on the payment of one hundred dollars in seven months from its date, and provided that, until default, the property should remain in the custody of the mortgagor. It was dated 18th January, 1855. The defendant was the landlord of the premises occupied by Martens & Hanschedt. They became indebted to him for rent, and, in May, Hanschedt gave to Borden & Degroot, of which firm the defendant was a member, the following paper:

“This is to certify, that I have sold all my right and interest of stock and fixtures contained in the basement story of building situate on the corner of Pearl and Fulton streets, known as No. 267 Pearl street, unto Borden & Degroot, for the sum of seventy-five dollars.

“Witness my hand and seal this fifth day of May, one thousand eight hundred and fifty-five.

(Signed) ED. HANSCHEDT.”

Under this, the landlord took possession of the property about the time of its date, and refused, upon a demand then made, to deliver it to the plaintiff, who claimed to take possession under the chattel mortgage. On the 28th of June, 1855, Martens & Hanschedt joined in a bill of sale to the plaintiff of the property, and he thereupon, without making any further demand of the defendant, brought this suit to recover damages for its detention. The only proof of the mortgage to the plaintiff offered on the trial was a certified copy from the Register's office, which the justice admitted “as evidence merely and with the effect prescribed by statute.” To the admission of this evidence the defendant's counsel excepted. Judgment having been rendered for the plaintiff, the defendant appealed.

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*H. William Channing*, for the appellant.

Submitted without argument by the respondent.

**INGRAHAM, FIRST JUDGE.**—The return shows, by the testimony of Martens, that he and Hanschedt both executed the mortgage. The copy was properly received in evidence, being certified by the Register. The justice says, he only received it as evidence of the matters allowed by law, although he might have received it as evidence in the cause generally.

The mortgage was not due when the demand was made of the property. There had been no default according to its terms, and the mortgagors were entitled to the possession of the goods, and not the mortgagee. The plaintiff then (to wit, in May) had no right of possession by which he could claim the goods, whether in possession of the mortgagors or of the defendant.

The bill of sale, executed in June subsequently, possibly gave to the plaintiff the title to the goods, and, if so, would be sufficient to sustain the judgment, if there had been any evidence of a demand from the defendant after the bill of sale had been executed. I can find no such evidence in the case. Where a third person has obtained possession of personal property, the owner may afterwards transfer his right to another, who, on demanding the same, may recover the value, if such demand is not complied with. But he must make such a demand to give him a right of action. *Hall v. Robinson*, 2 Com. R. 293; *Cap v. New Haven R. R. Co.*, 1 E. D. Smith's R. 522.

It is apparent, from the evidence in this case, that if the property had been demanded by the plaintiff, after the mortgage had become due, the judgment might have been sustained; but without such demand, where it appears no actual conversion had taken place, I am at a loss to see any grounds on which the reversal can be prevented.

Judgment reversed.

**DENNIS McCORMICK v. PATRICK MULVIHILL.**

It is erroneous to permit a witness to testify to an account from a transcript of the party's books, without their production, and especially so when his adversary has given him notice to produce the books on the trial.

A justice has no power to compel a party to the suit to testify, when he is not placed on the stand by his adversary. Unless called by his opponent he cannot be made a witness.

**APPEAL** by plaintiff from a judgment of the Marine Court. This was an action to recover for wages as a bar-keeper. The answer was a general denial and set-off.

On the trial, after the proof of the plaintiff's employment and services, the defendant called a witness to prove sales of liquors to the plaintiff, subsequent to the service, as a set-off. In order to testify to these sales, a transcript of the defendant's books was shown him. The plaintiff's counsel objected to this, and called for the original books, but the objection was overruled. It was admitted that the defendant had been subpoenaed to bring his original books with him, but had not done so. The court then called upon the plaintiff to take the stand. His counsel objected to his doing so. The court overruled the objection, and required him so to do, and examined him in respect to the accounts. Judgment having been rendered for the defendant, the plaintiff appealed.

*Snebly and Ackerman*, for the appellant.

*Sweeney and Shea*, for the respondent.

**INGRAHAM, FIRST JUDGE.**—The justice erred in permitting a witness for the defendant to examine a transcript from the defendant's books, and testify to the amount of sales appearing thereon, without requiring the production of the books, as asked for by the plaintiff.

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It may well be doubted whether, under the circumstances, the defendant's books could have been evidence in his own behalf, but there can be no doubt that the copy, or supposed transcript, not even proven to be a correct one, was improperly received by the court.

I think, also, the justice erred in compelling the plaintiff to testify on the motion of the justice, and not at the defendant's request. The plaintiff objected to the examination.

The law before the Code did not allow of the examination of the party at all. The alteration made by the Code allowed a party to be examined as a witness *only at the instance of the adverse party*. No authority is given to the court to call upon the parties to testify; and if such a course were allowed, the party so examined could not avail himself of the privilege conferred by the 895th section, of being examined on his own behalf, as that only applies to the case of a party examined by his adversary.

In the case of *Myers v. McCarthy* (2 Sand. S. C. R. 399), the Superior Court held that evidence in answer to a question put to a party by the court, when such party was called by his adversary, was improperly called forth. If this is so when the adversary puts the party on the stand as a witness, it is certainly much more improper for the court to compel a party to testify when his adversary does not ask for his examination.

Judgment reversed.

## PATRICK MCGARRELL v. ANTHONY MURPHY.

Where one of two tenants in common gave permission to a third person to occupy a part of the premises, and the other co-tenant expelled him, *held*, that the latter was a trespasser, that the possession was joint, and that neither co-tenant could take the exclusive possession.

APPEAL by defendant from a judgment of the Seventh District Court. This was an action brought to recover damages for a wilful trespass. The facts sufficiently appear in the opinion of

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the court. Judgment was rendered for the plaintiff for \$25 and costs, from which the defendant appealed.

*J. B. Fitzgerald*, for appellant.

Submitted without argument by the respondent.

**INGRAHAM, FIRST JUDGE.**—The defendant and one Quinn were tenants in common of a house and lot in this city. Quinn gave the plaintiff permission to occupy two rooms, in the house belonging to him and Murphy, for nine days. The plaintiff removed there. Murphy met the plaintiff on the premises, and asked by what authority he was there. He said Quinn gave him permission, and on being asked for Quinn's permission he did not show it, and the defendant put him out.

The defendant's act of expelling the plaintiff was unauthorized. By Quinn's permission he was on the premises. He was entitled to all the rights which Quinn had, viz., the right to occupy jointly with the defendant the premises in question. One tenant in common has no right to expel the other. The occupancy is joint, and each party has a right to occupy jointly with the other. Neither tenant is bound to abandon the possession, nor to make partition, nor occupy one-half. His possession is not unlawful, if he does not prevent his co-tenant from occupying with him. *Mumford v. Brown*, 1 Wend. 52.

The defendant was guilty of a trespass in removing the plaintiff.

Judgment affirmed.

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**FREDERICK N. D. VAN LIEN v. MATTHEW BYRNES.**

B. applied to V. L. & Co., brokers, to procure a loan of \$9,000. They introduced him to S., another broker, who in turn introduced him to St. J., who offered him a loan of \$7,000. This he agreed to take, but subsequently, finding it insufficient for his purposes, declined it. S. thereafter procured another loan for him, for which he paid a commission.

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*Held,* I. That V. L. & Co. could recover a reasonable compensation for procuring the loan of \$7,000, S. having told B., the defendant, that he, S., had nothing to do with the commissions on that loan, but would settle with V. L. & Co.

II. That evidence of conversations between S. and B. was inadmissible, unless confined to conversations showing a payment to S. for the commissions on the first loan.

III. That parol evidence that a receipt was given by S., which was intended to cover both loans, was inadmissible, and was properly excluded. The receipt should have been produced.

Where no custom is shown, a broker, like any other person who performs services for another, is entitled to compensation; and it is immaterial whether his services proved beneficial to the party who employed him or not. If he has fully performed what he was employed and undertook to do, he is entitled to be remunerated.

An undisclosed principal may always sue to enforce rights acquired on his behalf by his agent, though he does so subject to any equities which the defendant may have against the agent.

APPEAL by defendant from a judgment of the First District Court. This action was brought to recover for brokers' services, rendered to the defendant by the firm of Van Lien & Co., who assigned the claim to the plaintiff. The facts were these: Samuel Beman, who was in the employ of Van Lien & Co., brokers, having heard from one Flynn, another broker, that the defendant wished to obtain a loan, went to him, and agreed with him to procure him a loan of \$9,000, for one per cent. commission. Beman then introduced him to one Spafford, another broker, by whom he was introduced to a Mr. St. John. St. John agreed to loan him \$7,000, which the defendant agreed to take, but afterwards declined, because it was insufficient for his purposes. Spafford afterwards procured another loan for the defendant, on the same property, for which he paid Spafford, taking the following receipt:

"Rec'd, New York, Sept. 13th, 1855, from Mr. Matthew Byrnes, forty-five dollars, in full for commissions for negotiating loan for him upon house in Lexington avenue, near Twenty-ninth street, and for all charges against him to date.

"\$45. (Signed) H. A. SPAFFARD."

Mr. Spafford testified, however, that he told the defendant

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that he had no claim against him for procuring the first loan; that he had nothing to do with those commissions, but would settle for them with Van Lien & Co., as they employed him. And it further appeared that they did settle with him therefor. The defendant's counsel called, upon the trial, one Albon P. Mann, who testified that he was present at a conversation between Spaffard and the defendant, about three weeks subsequent to the defendant's refusal to take the first loan. The counsel then asked him the following questions:

“Was the loan between St. John and the one subsequently taken talked over there?”

Objected to, and excluded.

“Was a receipt given, which was intended to embrace both loans?”

Objected to, and excluded.

The defendant's counsel also offered to show that the loan of \$7,000 was not large enough, and that he subsequently effected another.

This was objected to and excluded. The court rendered judgment for the plaintiff for \$70, and the defendant appealed. The facts, except as above stated, appear fully in the opinion of the court.

*Thompson and Kellogg*, for the appellant.

*F. W. Burke*, for the respondent.

DALY, J.—The plaintiff is a member of the firm of Van Lien & Co., who are brokers, engaged in the business of procuring loans upon real estate. The defendant, Byrnes, wished to obtain a loan of \$9,000 upon two houses; and one Beman, who was acting as the clerk of Van Lien & Co., went to the defendant, and the defendant agreed to pay one per cent. commission for procuring the loan. Beman took his application, and introduced him to one Spaffard, another broker, who introduced the defendant to one St. John. St. John agreed to loan \$7,000 upon the houses, and the defendant agreed to take it; but, a week

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after his interview with St. John, the defendant, finding that he could not get along with the \$7,000, went with Spaffard to St. John, and the loan was given up. Spaffard afterwards obtained another loan for the defendant, for which, it appears, the defendant paid him a commission. The action was brought by the plaintiff to recover compensation for procuring the loan of \$7,000; that is, he claimed for commission due him to the amount of \$70. It further appeared that Spaffard told the defendant that he (Spaffard) had nothing to do with the commission from him; that he (Spaffard) would settle with Van Lien & Co., who employed him; and Spaffard testified that Van Lien & Co. had settled with him.

The case discloses that a person was procured who was ready and willing to loan \$7,000 upon the security that the defendant had to offer; and that, though the defendant was anxious to get \$9,000; he concluded to take the \$7,000, though he afterwards changed his mind. It does not appear that the payment of a commission was to depend upon his obtaining exactly the sum of \$9,000; and, from his consenting to take a less sum, the law would adjudge an implied agreement on his part to pay a just and fair compensation to the plaintiff for his services in assisting the defendant to procure that sum. It is urged, however, on the part of the defendant, that, as he afterwards changed his mind, and did not accept the proposed loan of \$7,000, he is not bound to pay anything to the broker; that, though a person was procured who was willing to loan him \$7,000, which he was at first willing to take, yet, having concluded afterwards not to take it, he has derived no benefit from what was done by the plaintiff or his clerk, but has obtained another loan, through another broker, for which he has paid a commission.

We are referred to several English cases (*Read v. Rann*, 10 Barn. & Cres. 438; *Dalton v. Irvin*, 6 C. & P. 289; *Brood v. Thomas*, 7 Bing. 101) as authorities for the doctrine, that where a broker undertakes a particular business, he can recover nothing for his services unless that business is completed; though the person for whom the broker acts has, in the transaction nego-

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tiated by the broker, made a bargain, which he afterwards un-  
warrantably refuses to complete and carry out. These cases,  
however, are founded upon a mercantile usage prevailing in the  
city of London, by which nothing is allowed to the broker unless  
the matter brought about by his instrumentality is completed.  
In all these cases, evidence of the custom was given, and they  
were decided with reference to it. The reason of the custom,  
as stated by Tindal, C. J., in *Brood v. Thomas*, being, that noth-  
ing was allowed to the broker unless the transaction was con-  
summated, because the rate of payment established by the custom,  
if the business was completed, was greater than would otherwise  
be a fair compensation for the broker's services. This was  
merely recognizing that, by the custom of London, a broker  
in that city was not entitled to compensation for anything  
he might do for a party, which was not finally consummated,  
but was engaged in the prosecution of a general business,  
in which the large compensation he was entitled to receive,  
where the transactions he negotiated were completed, was re-  
garded as a fair equivalent for his loss of time and service in  
matters not completed by the parties. It was therefore held in  
these cases that the broker must recover according to the usage  
or not at all, as all parties, in the absence of proof of a different  
contract, were presumed to contract with reference to the custom,  
and no other contract could be implied. Where no custom is  
shown, a broker, like any other person who performs service for  
another, is entitled to compensation; and it matters not whether  
what he has done prove beneficial to the party who employs  
him or not, if he has fully performed what he undertook to do,  
he is entitled to be remunerated for his services. In this case,  
the plaintiff's clerk undertook to procure for the defendant a  
loan of \$9,000 upon his property, and, through the steps taken  
by Beman, the defendant was brought in connection with a per-  
son who was willing to loan \$7,000 upon it, which the defendant  
was willing to take. If the defendant had received that amount  
from St. John, he would have been indebted to the exertions of  
the plaintiff's clerk for procuring it, and could there be a doubt

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but that in that case the defendant would be bound to pay something to the plaintiff for rendering that service? Having agreed to take that sum, and thus dispensed with all further service on the part of the plaintiff, he concludes, a week afterwards, to change his mind, and declines to take it. Now, shall the broker get nothing for his time, knowledge, and exertions in procuring a loan, with which the defendant is satisfied and agrees to take, but afterwards concludes to decline? If it appeared that brokers in this city, where the transactions they negotiate are completed and carried out by the parties, are accustomed to receive a rate of compensation fixed with reference to their being subject to loss of time and service where the business they negotiate falls through, it might be very well, in a case like the present, to hold that the plaintiff should get nothing; but, in the absence of proof of any such usage or custom, would it be just and equitable to say that he should give his time and attention to the defendant's business and receive nothing for it; that the defendant should avail himself of the services of the plaintiff's clerk in discovering a person who was willing to make a loan upon his property, and be under no obligation to pay anything for the service? If the plaintiff was not engaged in this particular business of procuring loans upon real estate, or if the agreement with Beman was, that his receiving compensation was to depend upon his obtaining the exact sum of \$9,000, then, in the one case, the service might be regarded as a mere incidental or voluntary one, and in the other as a contract not performed. But it was a service rendered by the plaintiff's clerk in the regular course of business; and the evidence would not have warranted the justice in concluding that the promise to pay was conditional. The defendant had the benefit of the plaintiff's knowledge and services, and might have obtained the \$7,000, and, if he concluded afterwards not to take it, he was bound to make some compensation to the plaintiff.

That the plaintiff, through his clerk, was the procuring cause of the loan of \$7,000 being offered to the defendant there can be no doubt. It is true, that Beman went to Spaffard, another bro-

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ker, and it was through Spafford that St. John was found. But that makes no difference, Spafford considered himself employed by the plaintiff in the matter, and the plaintiff paid him for his services.

Nor does it make any difference that Beman did not disclose to the defendant that he was acting as the clerk of the plaintiff. An undisclosed principal may always sue to enforce rights acquired on his behalf by his agent, though he does so subject to any equities which the defendant may have against the agent. *Taintor v. Prendergast*, 3 Hill, 72.

Beman agreed that the defendant might settle with Spafford. He told the defendant that any settlement he made with Spafford would be satisfactory to him; and undoubtedly any settlement made with Spafford would bind the plaintiff. But no evidence was given or offered of such a settlement. If anything had been paid by the defendant to Spafford in the presence of the witness Mann, the conversation between the defendant and Spafford respecting such payment, and what it was intended to discharge, would have been competent; and as Spafford had denied that any such settlement had taken place, a receipt from him, disclosing the fact of such a settlement, might have been given in evidence to contradict him. But conversations between the defendant and Spafford, three weeks after the defendant had declined the \$7,000 loan, were wholly immaterial, unless they related to an actual settlement with Spafford. The defendant was not entitled to ask for such conversations generally. If any payment had been made to Spafford, in discharge of the claim, or any settlement effected with him, by the defendant in the witness's presence, that fact could have been shown by a question put directly to the witness. He might have been asked if he had heard any conversation between them, or had seen any money paid relating to a settlement of the claim, and if he replied in the affirmative, he would have been allowed to state what he had seen and heard. But he was asked if the loan between St. John and the defendant and the one subsequently taken was talked over in his presence. Whether it was or not,

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was entirely immaterial. The question should have been confined to conversations relating to a settlement. If Mann had witnessed any settlement, he should have been directly interrogated as to the fact; or if, after the general inquiry was excluded, the defendant should have made a distinct offer to prove a settlement of the claim in a conversation between Spaffard and the defendant, it would have been error on the part of the justice to have refused to receive the evidence. But no such offer was made, and it is very plain that the defendant had no such evidence. If any receipt was given, it should have been produced. The defendant was not at liberty to ask if one had not been given embracing both claims. This was not asking for facts, but for the opinion of the witness, and was properly excluded. So also were the questions relating to the subsequent loan. They were wholly immaterial. The plaintiff proved that he had rendered service to the defendant, to enable him to procure a loan upon his property, for which he sought to be compensated; and what the defendant did, after he had declined to take that loan, could not affect the question of his liability to the plaintiff for aiding him to procure a loan, which he might have had, and was at first willing to take, but afterwards declined.

The justice appears to have allowed at the rate of one per cent. upon the \$7,000; and as there was evidence that the defendant agreed to pay that amount for obtaining the loan of the \$7,000, and also of one per cent. if \$9,000 was obtained, I think he estimated the value of the service as correctly as he could.

Judgment affirmed.

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HENRY MCCOLLUM and another v. JOHN MCCLAVE.

Judgment having been rendered in the plaintiffs' favor in the Marine Court, upon the default of the defendant, it was opened, and the cause was ordered to be placed on the calendar for 20th February. It was, instead, placed thereon on the 23d, and, the defendant not appearing on that day, an order was made that the judgment before taken should stand, with costs. *Held*, irregular,

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1. There being no adjournment from the 20th to the 23d, the court lost jurisdiction of the cause.
2. The judgment having been absolutely set aside, could not be revived. The justice should have heard the proofs of the plaintiff, and rendered judgment thereon.

**APPEAL** from a judgment of the Marine Court. On the return day of the summons in this action, the defendant failed to appear, and an inquest was taken and judgment was rendered thereon. On the defendant's motion, this judgment was afterwards set aside, and the cause was set down for trial for the 20th of February. The cause was not put on the calendar for that day, but was placed on the calendar on the 23d of February. On that day the defendant failed to appear, and the plaintiffs' attorney assuring the court that the cause was properly upon the calendar, the following order was made:

"This cause having been tried on the 12th day of February, 1855, and a judgment rendered therein for \$161.17, the defendant moved to have the default opened, and be permitted to defend, which was accordingly done, and defendant answered, and the cause was put on the calendar; no one appearing for defendant, ordered, that judgment stand as before taken, with \$12.00 allowance, and \$5.00 costs and disbursements."

From the judgment entered on this order the defendant appealed.

*S. B. Noble*, for the appellants, contended that the court lost jurisdiction by the failure to have the cause adjourned regularly from the 20th to the 23d of February, and quoted, in support of the position, *Wight v. McClave*, 3 E. D. Smith's R. 316.

*McCunn and Moncrief*, for the respondent.

**BRADY, J.**—An inquest having been taken in this action in the Marine Court, whether properly or not, it was, on the defendant's application, set aside, and the cause ordered to be placed on the calendar for 20th February, 1856. It was not placed on the calendar on that day, and on the 23d February,

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1856, from assurances of the plaintiffs' counsel that the cause, then on the calendar, was properly there, and the defendant not appearing, the justice, by order, without proof, directed that the judgment before taken, and which was set aside, should stand, with \$12 costs. The judgment must be reversed for two reasons, one of which is, that there was no adjournment from the 20th to the 23d February, and the justice lost jurisdiction; the other, that if the adjournment had been regular, the justice had no power to render judgment in the manner adopted. He should have heard the proofs and allegations of the plaintiff. When a judgment is set aside absolutely in any court, whether of record or limited jurisdiction, and the cause is thereafter continued, the plaintiff must prove his case in the usual way. A judgment once vacated is always vacated, and the defendant stands in reference thereto as if no action had been prosecuted against him.

Judgment reversed.

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#### ANDREW MITCHELL v. ANTON MENKLE.

Judgment having been rendered in the Marine Court in the plaintiff's favor, on the defendant's default, and an order having been made opening the default, on condition of the payment of certain costs, and setting the cause down for trial for a day certain, the defendant not appearing on that day, and not having paid the costs, on an affidavit of that fact, the court vacated the original order opening the judgment. *Held*, regular.

On appeal from the Marine Court, this court can look only at the return of the justice.

On such appeal, this court will not review matters resting in the discretion of the court below, or questions of practice merely, unless they affect the substantial rights of the parties, and are returned by the justice as part of the proceedings in the cause.

APPEAL by defendant from a judgment of the Marine Court. The facts, as they appeared by the return, are fully stated in the

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opinion of the court. An affidavit of the defendant's attorney was attached to the return containing an excuse for the default, on which the judgment appealed from was entered.

*Pinney and Postley*, for the appellant.

*Benj. T. Kissam*, for the respondent.

**INGRAHAM, FIRST JUDGE.**—In this case the defendant appeared and answered; an inquest was afterwards taken against him, which, on his application, was opened on payment of certain costs, and a day was fixed for a new trial. On that day the defendant did not appear, and, on proof of non-payment of the costs before ordered, the court vacated the order granting a new trial, and confirmed the first judgment.

On this appeal we can only look at the return made by the justice. In those proceedings we find no error. The new trial was granted on certain conditions. Those conditions were not complied with, and the defendant was not therefore entitled to the benefit of the former order; the subsequent action of the court in reversing the former order and confirming the judgment was not erroneous, although perhaps it was unnecessary, as the defendant had not taken the necessary steps to make the order so vacated in any way operative.

I have noticed on this occasion the practice of the court below, because the justice has stated it in his return, although it is not to be understood as in any way committing us to the review of matters of practice merely, in that court, unconnected with the merits. In no case will we review such questions, resting solely in the discretion of the court below; and no questions involving the practice merely of that court can properly be matter for review here, unless they affect the substantial rights of the parties, and are returned to us by the justice as part of the proceedings in the cause.

Judgment affirmed.

HENRY ROBINSON, administrator, &c, v. THE HUDSON RIVER RAILROAD COMPANY.

This cause was tried in January, 1853, and the complaint dismissed. The plaintiff, for the purpose of moving for a new trial, served a proposed case, and on the same day the defendant's attorney entered into a stipulation, that the defendant's proceedings should be stayed, until the case, or bill of exceptions, was settled and argued, and finally disposed of. Amendments to the case were served in due time, and seven days thereafter notice of settlement was given by the plaintiff's attorney, and the case and amendments were subsequently left for settlement at the court-room for the judge who tried the cause. No further proceedings were taken in the cause by the plaintiff, and the case was not settled. In June, 1854, judgment was entered for the defendant, and notice thereof in writing was given to the plaintiff's attorney. No appeal was taken from this judgment, nor was any motion made to set it aside. In December, 1855, a motion was made by the plaintiff for the settlement of the case. *Held*, that it was properly denied.

1. No appeal having been taken from the judgment, and the time to appeal having expired, the settlement of the case would be of no utility.
2. The delay of the plaintiff in making the application was a complete answer to it.
3. The defendant's practice was regular. The stipulation did not operate as a perpetual stay. The notice of settlement of the case not having been served within the required time, the proposed amendments were to be deemed agreed to under Rule 15; and the case not having been filed within ten days thereafter, was to be deemed abandoned under Rule 17 and so "finally disposed of," within the meaning of the stipulation.

APPEAL from an order made at special term denying a motion on behalf of plaintiff to settle a case. This action was tried on the 19th and 20th of January, 1853, and the complaint was dismissed. On the 29th of January the plaintiff served on the defendant a proposed case, and on the same day the defendant's attorney gave to the plaintiff's attorney the following consent:

(Title of the cause.) "I consent that all proceedings on the part of the defendant, in the above cause, be stayed, until the case or bill of exceptions is settled, and until the same is argued and finally disposed of.

(Signed) "THOMAS M. NORTH,  
"Jan. 28, 1853. Deft's Atty."

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On the 4th of February the defendant's attorney served his amendments to the case, and on the 11th of the same month the plaintiff's attorney served notice of settlement. On the 15th the case and amendments were left at chambers, with some one there, for the judge who tried the cause. Thereafter, as appeared by the affidavits of the plaintiff's attorney and his clerk, they repeatedly inquired for the case, but without success. It did not appear that the case ever reached the judge. On the 28th of June, 1854, judgment was entered for the defendant, and notice in writing was given to the plaintiff's attorney. On the 28th of December, 1855, a motion was made before the judge who tried the cause for a settlement of the case. The motion was denied, and the plaintiff appealed.

*D. E. Wheeler*, for the appellant.

*Thomas M. North*, for the respondent. I. The order appealed from is not an appealable order. Code, § 319; *Tallman v. Hinman*, 10 How. Pr. R. 89. II. The case has already been settled by the plaintiff's failure to serve notice of settlement within four days after receiving the defendant's amendments. Rule 15, Sup. Ct. Rules. III. No appeal having been taken from the judgment, and the time to appeal having expired, the settlement of the case could do no good. Even if the judgment were in violation of the stipulation and irregular, the plaintiff must move to vacate it. This he should have done long since. IV. The stipulation has nothing to do with this motion, whatever might be its effect on a motion to vacate the judgment. But, in fact, it has been strictly kept. The case having been settled on the 8th of February, 1853, by operation of the 16th rule, it should have been filed within ten days thereafter, and not having been so filed, it became, in the words of the stipulation, "finally disposed of," by operation of the 17th rule.

**BRADY, J.**—The plaintiff had notice on the 24th of June, 1854, that judgment had been entered against him, and no appeal was

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taken within the time limited by statute. The stay given by defendant's attorney was not a perpetual stay, and expired when the case was finally disposed of. The amendments were served on 4th February, 1858, and the notice of settlement served on the 11th of February, 1853. The amendments, by rule 16 of the Supreme Court, were agreed to, the notice of settlement not having been served within four days after the service of amendments. Rule 15. Notice of settlement was therefore unnecessary, the case having been settled by operation of the rule just referred to. The 17th rule requires the party making the case to procure the same to be filed within ten days after it shall be settled; and although, where a party has *regularly served notice* ~~of appeal~~, his omission to file a case or exceptions confers no right on the opposite party to have his appeal dismissed (*Brown v. Heacock*, 9 How. Pr. R. 345), yet it operates as a final disposition of the case, or bill of exceptions, and leaves the party to argue his appeal on the judgment-record alone. The stay given by the defendants expired when the case was *disposed of*, and, as we have seen, the case was disposed of by force of rules 16 and 17 of the Supreme Court, referred to, long prior to the entry of judgment.

The appellant, in answer to this, urges that the case and amendments were, at the time designated for that purpose, handed to Judge Woodruff, or some person at the chambers of this court, to be given to the judge; and that, after repeated efforts to obtain them, application was made for leave to settle the case as made by the plaintiff, which was not granted. From the order denying the motion on that application the appeal is taken.

As appears already, the notice of judgment was given on the 24th of June, 1854, and the application for relief under the circumstances was not made until December, 1855. The papers never reached Judge Woodruff, who presided at the trial; and after the laches of the plaintiff, extending over a period of nearly a year and a half after the notice of the judgment, Judge Woodruff properly and justly refused to permit a settle-

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ment of the case. The delay itself was a complete answer to the favor asked, without reference to the fact that, if the case were settled, no appeal having been taken within the thirty days allowed by the Code, such settlement would be of no utility. The defendant is not responsible for the dilemma in which the plaintiff is placed, and is not by any rule required to waive his rights finally acquired. For these reasons, the order appealed from, made at special term by Judge Woodruff, must be affirmed.

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GEORGE BLUM v. EDWARD HIGGINS.

The court has the power to set aside a verdict, and order a new trial, on the ground of excessive damages, even in an action for a mere personal tort, as in an action for an assault and battery, where, upon a comparison of the verdict of the jury with the facts established before them, it appears that they acted under undue motives, or some gross error or misunderstanding.

But to justify such an interference with the verdict of the jury, the case must be very gross and the recovery enormous.

\$500, held not so excessive, under the circumstances of this case, for an assault and battery and false imprisonment at sea, as to call for the interference of the court. (a)

APPEAL from an order at special term, denying a motion for a new trial on the ground of excessive damages. The facts appear in the opinion of the court.

*A. R. Macdonough*, for the appellant. 1. The plaintiff is entitled only to compensatory, not exemplary damages, there being no evidence of actual malice. *Wiggin v. Coffin*, 3 Story's Rep. 1; *Watson v. Chrystie*, 2 Bos. & P. 224; 4 Barnew. & Cresw. 251; *Sedgwick on Damages*, p. 472. 2. Compensatory damages only being allowed, the amount of the verdict is excessive for this object. *Benson v. Frederick*, 3 Burr. 184, 185.

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(a) Compare *Cropsey v. Murphy*, ante, p. 126.

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*Charles W. Prentiss*, for the respondent.

BRADY, J.—This action was brought to recover damages for assaults and batteries committed by the defendant, who was the master of the steamship Hermann, on board of that vessel, and for an alleged imprisonment of the plaintiff, by tying him to the rigging and keeping him there for a long time. The damages claimed in the complaint were \$10,000. It was tried on the 22d of January, 1856, before Judge Daly and a jury, and a verdict of \$500 rendered against the defendant. A motion was made at special term, Judge Daly presiding, for a new trial, on the ground that the damages were excessive. The motion was denied, and from the order made thereon the defendant appeals. No exception was interposed to the charge of the judge on the trial, and no question seems to have been presented upon the liability of the defendant to respond in some amount for his ill treatment of the plaintiff.

It was at one time doubted (*vide* Sayer's Law of Damages, 210, 238), whether, in cases of mere personal tort, the court had the power to interfere on the ground of excessive damages; but the practice has long been settled in England that a new trial may be had for such a reason, where, from the facts established before the jury, when compared with the amount of their verdict, it appears that they acted under undue motives, or some gross error or misunderstanding (*Chambers v. Cullfield*, 6 East. 244; 4 Burr. 1971; Cowp. 230); and in this state it is well settled, by a series of cases, that a new trial may be granted where the damages are so excessive "as necessarily to evince intemperance, passion, partiality, or corruption on the part of the jury." *Sargeant v. Demston*, 5 Cowen, 106; *Tillotson v. Cheetham*, 2 John. Rep. 68; *Coleman v. Southwick*, 9 John. 45; *Root v. King*, 7 Cowen, 613; *Cole v. Perry*, 8 ibid. 214; *Douglas v. Tousey*, 2 Wendell, 352; *Rychman v. Perkins*, 9 ibid. 470. (*Vide* a host of American cases on this subject, in this and other states of the Union, which will be found collated in 1 Graham and Waterman on *New Trials*, pp. 409 to 441, *passim*.)

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Chief Justice Kent, in *Tillotson v. Cheetham, supra*, which was an action of slander, says, "We have no standard by which we can measure the excess. It is a matter resting in the sound discretion of a jury." And again, "A case must be very gross, and the recovery enormous, to justify our interposition on a mere question of damages in an action of slander." Applying the rule to this case, it is clear that a new trial cannot be granted. The testimony was contradictory upon the character and extent of the injuries inflicted upon the plaintiff, and upon the manner and violence of the treatment complained of. It was peculiarly in the province of the jury, and there is nothing in the case which would justify the impression that the jury acted from undue motives. The remarks of Judge Ingraham, in the case of *Scherff v. Szadecsky* (1 Abbott, 375), on the subject of excessive damages, are applicable here: "The cause of action is one in which it is difficult to fix any limit to the amount; one which is peculiarly within the province of the jury, and the mere amount of the damages, without some other fact to establish it, would not justify us in saying that the jury were actuated by improper motives in settling it."

The order appealed from must be affirmed, with \$10 costs.

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#### EUGENE VATEL v. JAMES HERNER and SAMUEL GARDNER.

An interference by the landlord with the person of the tenant, although on the demised premises, does not constitute an eviction. It is a trespass only, and the remedy of the tenant is by action for the assault.

The use of a privy by a landlord in a passage way leading to the demised premises, and which was there at the time of the hiring, although so used as to be offensive to the tenant, does not of itself constitute an eviction, the tenant not being actually deprived of any part of his premises.

APPEAL by defendant from a judgment of the Fourth District Court. This was an action by the plaintiff, as assignee of Daniel Griffin, to recover \$25 rent. Daniel Griffin was the

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lessee of the building No. 47 Dey street. In the rear of this building is another, approached both by an alley way and by the hall of the front building, which runs through from front to rear. Between the two buildings is a vacant space; that part of it which is opposite the hall of the front building being enclosed so as to make a covered and enclosed hall from Dey street through the front building to the one in the rear. The first floor of the rear building was occupied by Mr. Gardner, one of the defendants—the defendant Herner being sued as surety. By lease in writing, Daniel Griffin rented, in March, 1854, to the defendant Gardner, "the right of way through the hall of house No. 47 Dey street, also, the vacant space between said house and rear brick building, the same enclosed as now, between said house and brick building, which may be altered and fitted up so as to connect with the rear building, at the said Gardner's expense, he leaving the same in as good order," &c. It was for one quarter's rent of these premises that this action was brought. The defendant claimed to have been evicted from the premises by the plaintiff. It appeared that in the hall of the front house, under the stairs, and almost opposite, but a little to one side of the doorway, opening upon the enclosed vacant space hired by the defendant Gardner, was a water-closet. This was closed at the time Gardner hired the premises in question, but it was afterwards opened and used by Griffith. The evidence showed that the door of the water-closet was allowed frequently to remain standing open; that when thus open it partially obstructed the entrance to Mr. Gardner's premises. The evidence was conflicting as to the condition of the water-closet—whether kept clean, and in a good condition or not. It also appeared that Mr. Griffith had forcibly ejected Mr. Gardner from that part of the vacant space between the two houses which was not enclosed. The court gave judgment for the plaintiff, from which the defendant appealed. Two actions, for two different months' rent, were submitted at the same term.

*Hooper C. Van Forst, for appellant.*

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*Niles and Bagley*, for the respondent.

INGRAHAM, FIRST JUDGE.—Any interference with the person of the tenant, although on the demised premises, would only be a trespass, and not an eviction. If the landlord improperly assaulted him, the remedy is for the assault, and not for eviction.

The space rented by the agreement was only the vacant space between the front and rear buildings as enclosed, and not the part unenclosed. The privilege to alter and fit up the same evidently shows that the intent was to make a continuous passage to the back building through the enclosed space, with a view, probably, of making a continuous covered passage way to the tenant's premises.

The only question, therefore, is, whether using the privy in the passage way, which was there at the time of the hiring, although not in use, is to be treated as an eviction.

The tenant was not deprived of any part of the premises. He remained in the use of them afterwards. If the privy was used so as to be offensive, he had a remedy therefor; but the mere use of it, after the lease, cannot be treated as an eviction.

The courts have always hesitated about extending the rule as to eviction beyond an actual expulsion from the premises, or some part of it. The case of *Campbell v. Shields* (11 How. Pr. Rep. 565), cited by the appellants, establishes this doctrine, and shows that the appellant's remedy is for the trespass, and not for the eviction.

Judgment affirmed.

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#### PATRICK BRENNAN v. JOHN P. HAFF.

The defendant's horse having been stolen, he offered a reward of fifty dollars for the detection of the thief. The plaintiff informed him that D. was the thief, and gave him some information tending to sustain this charge, and the defendant had D. arrested therefor.

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*Held*, sufficient *prima facie* evidence to sustain a recovery for the amount of the reward, without showing D.'s conviction on the charge.

If D. had been acquitted, or released, or if the charge made against him was unfounded, it was incumbent on the defendant to show the fact, to rebut the presumption arising from the proof of such arrest of D. at the instigation of the plaintiff.

APPEAL by defendant from a judgment of the Seventh District Court. The defendant was the proprietor of the Elm Park Hotel. A horse belonging to him having been stolen from his barn, he caused the following advertisement for its recovery to be inserted in the New York Herald:

“\$50 REWARD.—Stolen, from the barn of Elm Park Hotel, on the Bloomingdale Road, on the evening of October 22d, a bobtail gray mare, about fifteen hands high, together with harness and red blanket. Twenty-five dollars reward will be paid for her whereabouts, and fifty dollars will be paid for the detection of the thief. Ferry masters and livery stable keepers are requested to notice and give information. The above reward will be paid by

“JOHN P. HAFF,  
“Proprietor of Elm Park Hotel.”

This action was brought to recover \$75, claimed for information given pursuant to this advertisement. It appeared that in consequence of the advertisement the plaintiff called upon the defendant, informed him where the horse, &c., was to be found, and told him that one Denman was the thief; that he saw him go down the Bloomingdale road with the horse. The defendant then said he should have the reward. His subsequent statement that he had got the horse, and had had Denman arrested, was also proved. It also appeared that he learned the whereabouts of the horse from another source prior to the information derived from the plaintiff. The justice gave judgment for the plaintiff for \$50, from which the defendant appealed.

*J. F. Malcolm*, for the appellant.

*A. C. Morris*, for the respondent.

DALY, J.—The judgment was right. The advertisement was headed, “\$50 Reward,” and then, after giving notice that the mare, a description of which was set forth, had been stolen, the advertisement specified that \$25 reward would be paid “for her whereabouts,” and \$50 for the detection of the thief. The justice would seem to have understood this as an offer of \$25 for the discovery of the property, and \$25 more for the detection of the thief; that is, \$50 if both ends were attained. He gave judgment for \$50, instead of the \$75 claimed by the plaintiff; and, upon the evidence the plaintiff was entitled to recover that sum. It was shown that the plaintiff called upon the defendant on the morning upon which the advertisement appeared, and told him where the horse was, and that he saw a person named Denman, whom he believed to be the thief, and who appears to have been known to the defendant, going down the Bloomingdale road with the animal. Two days after, the defendant admitted that he had got the horse, and that he had had Denman arrested, which was sufficient *prima facie* to warrant the justice in concluding that the information furnished by the plaintiff had led to the discovery of the property and the detection of the thief. The plaintiff was not bound to show that Denman was convicted. He proved that he had been arrested at the instance of the defendant; that he was in custody upon the charge; and if Denman was innocent—if the charge against him was unfounded, and he had been released or acquitted—it was incumbent on the defendant to show it, or to remove the presumption created by the evidence, that the plaintiff had discovered or detected the thief. There was nothing to show any collusion between Denman and the plaintiff, or that he knew, when he saw Denman with the horse, that it had been stolen, or that he was apprised of the fact, or had any reason to suppose that a crime had been committed, before he saw the advertisement. The judgment should be affirmed.

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Jennings v. Alexander.

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THOMAS JENNINGS v. JAMES ALEXANDER.

O. W. B. hired certain premises, of which the plaintiff's assignor was owner and landlord, and O. R. B. became surety for the rent. O. W. B. having died, O. R. B. took possession of the premises, and sub-let to the defendant. The plaintiff's assignor having assented to this by taking an order of O. R. B. on the defendant for his rent, and having refused to substitute the defendant as his tenant in place of O. R. B., *held*, that he could not recover for rent of the defendant, the under-tenant, although there was some evidence of an express promise on his part to make a partial payment in settlement, there being no evidence of O. R. B.'s assent to such payment.

No action can be maintained by the lessor against an under-tenant upon the lessee's covenant to pay rent.

Nor can an action be maintained for use and occupation, unless there is an agreement for the use of the premises, express or implied, between the plaintiff and defendant.

**APPEAL** by defendant from a judgment of the Marine Court. This action was brought by the plaintiff as assignee of one Charles S. Roe, to recover rent.

Charles S. Roe was the owner of premises No. 406 Sixth avenue. At the time he became the owner of the premises they were leased to one O. W. Burnham—O. R. Burnham being surety on the lease. O. W. Burnham died. No letters of administration were taken out, but his widow assigned the lease to O. R. Burnham, the surety, who took possession, and subsequently leased to the defendant. The plaintiff's assignor, C. S. Roe, collected a part of the rent for the quarter previous to that for which this action is brought, by obtaining from O. R. Burnham an order on the defendant therefor. And it appeared by the testimony of C. S. Roe himself, that being asked by O. R. Burnham's agent to take the defendant as a tenant, he declined to do so, and said he knew no tenant except the surety. It was also in evidence that the defendant had paid O. R. Burnham's agent the rent sued for, \$25 in cash, and the balance of \$125 in his note. At the time the rent was demanded of him on the part of the plaintiff's assignor, and prior to his

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Jennings v. Alexander.

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payment to O. R. Burnham, he claimed some deductions on account of gas-fixtures, and damages for leakage in the roof, but offered to pay \$75 to Roe in full. Judgment was rendered in the court below for the plaintiff, from which the defendant appealed.

*Augustus Prentice*, for the appellant, cited *Smith v. Stewart*, 6 Johns. R. 46; *Bancroft v. Wardell*, 13 ibid. 489.

*Alfred Roe*, for the respondent, cited *Kenada v. Gardner*, 3 Barb. S. C. R. 589.

**BRADY, J.**—There was neither privity of estate nor privity of contract between the plaintiff or his assignor and the defendant, and no action can be maintained by the lessor against an under-tenant upon the lessee's covenant to pay rent. *McFarlan v. Watson*, 3 Comstock, 286. And no action to recover for the use and occupation of premises can be maintained, unless there is an agreement for the use of the premises, express or implied, between the plaintiff or his assignor and the defendant. 1 R. S. 748, § 26; *Wood v. Wilcox*, 1 Denio, 38; *Bancroft and wife v. Wardwell*, 13 Johns. R. 489; *Hall v. Southmayd*, 15 Barb. 32. And such agreement not being by deed, if a certain rent be reserved by it, it may be used as evidence of the amount of recovery. 1 R. S., § 26, *supra*; *Williams v. Sherman*, 7 Wend. 109.

The defendant entered under O. R. Burnham, and not under the plaintiff, and it was necessary to show some promise, express or implied, to pay the rent to the plaintiff by the defendant, with the assent of his lessor. In that case the action could be maintained. *McFarlan v. Watson*, *supra*. There is, however, no proof in this case that the lessor of the defendant ever assented to any such appropriation of the rent; but there is proof that C. S. Roe, the plaintiff's assignor, and owner of the fee, expressly declined to accept the defendant as his tenant. He so states himself, and his statements are conclusive on that subject. The

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defendant would be excused from payment to his lessor by proof of payment to the owner (*Peck v. Ingersoll*, 3 Selden's Rep. 525), for his own protection; but the evidence here does not show a state of facts to which that rule would be applicable. A mere promise by an under-tenant to pay the original lessor, without the assent of his landlord, even if unqualified, would not be sufficient to bind him; but the proof in this case is of an *offer* of about \$75, and, as it would seem, *by way of compromise*.

The respondent places his right to recover on what he designates the attornment of the defendant to the plaintiff's assignor, and the offer already mentioned. This position cannot be maintained. As between the plaintiff's assignor and the lessee of his grantor, there was no necessity for any attornment, the land having been conveyed while occupied by such lessee (1 Rev. Stat. 739, § 146); but the attornment by the defendant to the plaintiff's assignor, if proved, would have been void. They were strangers, and the defendant's landlord did not consent. 1 Rev. Stat. 744, § 3. There is, however, no evidence to show that the defendant attorned to the plaintiff's assignor, and nothing in the case from which any inference in respect thereto can be drawn, except the offer referred to. That, for the reasons assigned, is insufficient for any purpose in this action.

I do not deem it necessary to consider the proof of payment by the defendant to his landlord was such, as the conclusion is, from the views presented, that the plaintiff was not entitled to a judgment on the evidence produced.

The judgment of the court below must be reversed.

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CHARLES W. HENRY v. FREDERICK B. BETTS.

No action can be maintained against a father for clothes furnished to his minor child, upon the ground of their being necessaries, where it appears that the child is well provided for by the father.

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Henry v. Betts.

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But evidence that a minor child ordered clothes, of a party, for which his father subsequently paid without objection, is sufficient to warrant a finding of authority from the parent to the child to incur such obligations, and make such contracts on behalf of the father with the same person.

APPEAL by defendant from a judgment of the Sixth District Court. The facts are sufficiently stated in the opinion of the court.

*Gould and Field*, for the appellant.

*Alex. Spaulding*, for the respondent.

INGRAHAM, FIRST JUDGE.—This action is brought for clothes sold by the assignor of the plaintiff to defendant's son, he then being a minor, aged twenty years. Three or four years before, the son had ordered and procured clothes of the plaintiff, and defendant had paid the bills. The defendant never ordered any himself.

It is also shown that the son lives with his father, who is able to provide for him, and had so provided at this time. It is very clear that the defendant is not liable, upon this evidence, for the clothes as necessaries furnished to a child. There is no evidence showing they were necessary, or suited to the son's station in life, or that the defendant refused or neglected to provide for the son. On the contrary, it was admitted that the son was well provided for by the father. This of itself would be an answer to the claim on the ground that it was for necessaries furnished to an infant. *Van Valkenburgh v. Watson*, 13 J. R. 480; *Raymond v. Lloyd*, 10 Barb. S. C. p. 483; *Poock v. Miller*, *ante*, p. 108. I am of the opinion, however, that the facts proven are sufficient to establish the defendant's liability on another ground. The evidence shows that the defendant had previously permitted his son, when younger and having less discretion for such a purpose, to purchase clothing, and the defendant afterwards paid the bills. The rule is well settled, that a father is not liable in such a case, unless an authority is proven or may be implied from the circumstances.

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The justice has found in favor of the plaintiff, and his finding cannot be disturbed. In *Baker v. Keen* (2 Starkie's R. 501), a much less amount of evidence was considered sufficient to warrant the jury in finding that such implied authority existed. In that case, merely evidence that the father had placed a son at a military college, and paid his expenses there, was considered sufficient to warrant the presumption of authority from the father to order regiments and other articles for his equipment.

So it has been held that a contract made by a wife for the board of an infant daughter, unknown to her husband, but afterwards paid for by him, although he expressed disapprobation at it, was sufficient to establish the existence of a discretionary power on the part of the wife to contract for this purpose. See *Forsyth v. Milne*, cited in Story on Contracts, p. 120.

The evidence of previous purchases by the son with the knowledge of the father, and his payment of such bills, was sufficient to warrant an implied authority from the father so to do, and the fact, that such authority was given when the infant was younger and less capable of exercising his judgment than when he made the last purchase, furnishes no evidence to rebut such presumption.

Judgment affirmed.

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#### WILLIAM L. OSTERSTOCH v. GILBERT LENT.

An attachment against a non-resident debtor, issued from a district court, should be signed and issued by the clerk—it being the process by which the action is commenced. If issued and signed by the justice, he acquires no jurisdiction to proceed in the action commenced by it.

APPEAL by defendant from a judgment of the Fifth District Court. The facts sufficiently appear in the opinion of the court.

William C. Carpenter, for the appellant.

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Osterstoch v. Lent.

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*Diefendorf and Acker*, for the respondent.

**INGRAHAM, FIRST JUDGE.**—This action was commenced by attachment issued and signed by the justice, upon an affidavit showing the defendant to be a non-resident, and that he was indebted to the plaintiff upon contract.

The objections of the defendant to the mode of commencing the action, having been overruled, the defendant's counsel did not make any further defence, and judgment by default was entered against him.

The statute in regard to assistant justices' courts (Laws of 1820, p. 3) directs that the clerk shall make out and sign all process.

This statute is applicable to the present district courts, and the attachment in the case is the commencement of the action, then it should have been signed in the mode prescribed by law.

By the thirty-third section of the non-imprisonment act it is provided that, if the defendant reside out of the county, he may be proceeded against by summons or attachment. This is the mode of commencing the action. We have not been referred to any provision of the statute altering the law above referred to, nor have we been able to find any allowing the justice to sign the process.

When the proceeding is by attachment, the application should be made to the court, and, on the attachment being ordered, the clerk should sign and issue it.

There is nothing in the act of 1851 requiring such attachment to be under seal.

The case referred to by the defendant's counsel related to the Marine Court, and was governed by the statute specially applicable to that court.

The cause of action was sufficiently set out, but the objection stated was fatal to the jurisdiction of the court, and renders a reversal of the judgment necessary.

Judgment reversed.

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Cabre v. Sturges.

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**ALEXANDER CABRE and HIRAM W. LOVE v. RUSSELL STURGES.**

Where no notice of appeal is attached to the return, on an appeal from a district court, the appeal should be dismissed.

In an action to recover for the rendition of services, the defendant cannot avail himself of the defence that he acted only as agent, or for a firm of which he was a partner, unless he disclosed the fact of the partnership or agency at the time of making the contract upon which the action is brought. Having contracted for the service in his own name, he was personally liable.

**APPEAL** by defendant from a judgment of the Fifth District Court. This action was brought to recover \$4.96 for splicing a hawser. It appeared that the defendant employed the plaintiffs to splice the hawser for the steam tow-boat Titan; that he was in the tow-boat business, in partnership with one Joseph P. Martin; but it did not appear that at the time of the employment the plaintiffs were aware of the defendant's partnership. There was contradictory evidence as to the value of the work. The court rendered judgment for the plaintiff for \$4.46, from which the defendant appealed.

*Edward J. Boole, for the appellant.*

*Alex. Spaulding, for the respondents.*

**INGRAHAM, FIRST JUDGE.**—No notice of appeal is annexed to the return in this case, and we are therefore uninformed as to the ground of appeal. For this cause the appeal should be dismissed.

Upon the merits, as appears from the return, there is no ground for our interference.

The evidence shows that the defendant made the contract for the work. He made it in his own name, without disclosing that any other person was interested with him.

The plaintiffs were not bound to inquire whether, in his busi-

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ness, the defendant had a partner or not, or whether he was the owner of the steamer or not. He might rest on the express contract made with the defendant, and hold him to that liability.

If the defendant was acting as partner or agent, he should have disclosed the partnership or agency. Not having done so, he assumed the personal liability in his contract, and the justice did not err in rendering judgment against him.

Judgment affirmed.

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**ELY HUNT and WILLIAM B. NELSON v. HOBOKEN LAND AND IMPROVEMENT CO.**

The court will not consider an objection presented on appeal, which, if taken at the trial, might have been obviated by the respondent. This rule illustrated and applied.

The court will not, on a question of fact, disturb the finding of a jury, unless clearly against the weight of evidence.

A judgment of this court, on appeal, reversing a judgment of the Marine, or a district court, for the plaintiff, not predicated on the merits of the controversy, is no bar to another action for the same cause. Its effect is merely to remit the parties to their original rights and obligations.

The statute (2 R. S. p. 92, § 1), regulating the course of steamboats which "meet each other" on any waters within the jurisdiction of this state, does not apply to steamboats whose course is at right angles to each other. In such a case, when a collision occurs, the question of liability therefor depends upon the question of negligence, and is to be determined by the general considerations which govern such questions, not by the statute regulation.(a)

APPEAL by defendants from a judgment entered on a verdict of a jury. This was an action to recover damages for an injury occasioned to the Manhattan, the plaintiffs' steamboat, by a collision with the James Rumsey, the defendants' ferryboat. The Manhattan is a Hudson river steamboat. On the 13th of June, 1853, she left her pier at the foot of Robinson street, and proceeded up the North River. About Canal street it met the

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(a) See 3 E. D. Smith's Rep. 144.

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James Rumsey, the defendants' ferryboat, crossing from Hoboken to New York city. Their courses, if continued, would cross each other at right angles. As the boats were then proceeding, a collision was inevitable, and to avoid this the Manhattan turned her bows to the west, so as to pass under the stern of the James Rumsey. The James Rumsey also altered her course at about the same time; but, according to the testimony of the Manhattan's pilot, a little after, turning her bows to the right, down the river, so as to pass the Manhattan on her left side. The result was, that the James Rumsey struck the Manhattan on her larboard bow, injuring her so seriously as to make it necessary for her to abandon her trip, and return to New York for repairs. It was for damages for this collision that this action was brought.

This action was originally brought in the Marine Court, and a judgment rendered for the plaintiffs; but, on appeal to this court, that judgment was reversed for error in the charge of the judge. A new action was then commenced in this court, to which the defendants plead, as one of their defences, the former judgment in bar.

Upon the trial of the cause, the plaintiffs' counsel asked of Hazard Morey, the pilot of the Manhattan, the question:

"What was a proper course for a Hoboken ferryboat to take in crossing the river from Hoboken to New York?"

The question was objected to, on the ground that there was no evidence to show that the witness was acquainted with the course of the ferryboats. The witness then stated that he was acquainted with the usual course adopted by the ferryboats; whereupon the objection was overruled, and the evidence admitted. The plaintiffs' counsel also asked the following question of one George Lester, and a similar question, in a little different form, of Hazard Morey:

"What is the custom or course of navigation among pilots of steamboats, when their vessels are meeting at right angles?"

This question was objected to by the defendants' counsel, on the ground that it was a question of law fully provided for by

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statute.\* The objection was overruled, and an exception taken. The defendants, to sustain their defence, offered an exemplified copy-record of a judgment-roll in the Common Pleas, reversing the prior judgment for the plaintiffs in the Marine Court, as a bar to this action. It was excluded by the court, and an exception taken.

There was, also, some contradictory evidence upon the question as to which party was guilty of negligence. This question was left to the jury under the direction of the presiding judge, to whose charge no exception was taken, and a verdict was rendered for the plaintiffs for \$550. From the judgment entered on this verdict the defendants appealed.

*Cambridge Livingston*, for the appellants.

*Dennis McMahon*, for the respondents.

BRADY, J.—The first point presented by the appellants is not sustained by the objection taken on the trial. There was no objection to the testimony of the witness on the ground that he was not an expert, or that there was no evidence of his capacity as such. The objection was, that there was no evidence to show that he was acquainted with the course of the ferryboats, and thereupon, to meet it, the witness was interrogated as to that course, and answered that he was acquainted with it. The objection was then overruled by the presiding judge. That was, perhaps, unnecessary, inasmuch as the witness by his testimony removed the objection. He was acquainted with the course of the ferryboats, and thus possessed the only qualification required by the counsel for the defendants. We have held, in accordance

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\* The section of the statute referred to is as follows: "Whenever any steam-boats shall meet each other on the waters of the Hudson River, or on any other waters within the jurisdiction of this state, each boat so meeting shall go towards that side of the river or lake which is to the starboard, or right side of such boat, so as to enable the boats so meeting to pass each other with safety." 2 R. S. 92, § 1, (4th ed.), marg. paging, 1 R. S. 683.

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with the rule which prevails in all the courts, that we will not consider an objection presented on appeal, which, if taken at the trial, might have been obviated by the respondent, and that rule must be applied to the objection which is the subject of the first point.

The third, fourth and fifth points must be decided against the appellants. The verdict was not clearly against the weight of evidence, and cannot be disturbed for that reason. The questions submitted to the jury were questions of fact, peculiarly and exclusively within their province, to be determined by them upon the legal rules suggested on the trial, which should govern their deliberations. There are few cases presented in courts of justice in which a contrariety of testimony is not given, and this case is not within the exception. For these reasons, unless the presiding judge erred in declaring the law, the finding is conclusive.

The judgment of the Common Pleas, rendered on the appeal from the Marine Court, was not conclusive. It was not predicated on the merits of the controversy. The appeal was not upon the absence of any cause of action, but for errors of law committed by the court below, which were corrected, the judgment reversed and the parties remitted to their original rights and obligations. This is expressly adjudicated in this court (*Ellert v. Kelley*, 10 How. 392), and renders the consideration of the question, whether section 330 applies to appeals from the Marine and justices' courts, unnecessary. If the judgment of this court, on that appeal, had been otherwise, the proposition of the defendants' counsel would be incontrovertible, and that judgment a bar to this action.

No exception to the charge of the presiding judge was taken, but the appellants insist, in their second point, that he erred in permitting testimony to be given as to "the custom or course of navigation among pilots when their vessels are meeting at right angles," inasmuch as the statute and the common law defined what their course should be, and insists also that it was a question of law. We have no hesitation in adopting the view of the

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statute expressed by Judge Woodruff, in delivering the opinion on the appeal from the Marine Court, and in his charge to the jury in this case. When vessels meet at right angles, and a collision occurs, the question presented is one of negligence, and depends upon the general considerations which govern such questions, and not upon the statute regulation upon which the defendants rely. If steamboats meet on lines parallel to each other, whether proceeding up and down a river, or crossing it diagonally, the statute applies equally to them; and it becomes incumbent upon them each to go towards that side of the river which is to the starboard or right of such boat, as required by the statute. The observance of that statute under such circumstances, where it is not impossible, would, it seems, obviate a collision beyond all question; but, when vessels meet at right angles, the observance of such a rule might often result in the very catastrophe the statute was designed to prevent. It cannot be denied, with any propriety, that if a steamboat be proceeding down a river, and is met at right angles by one crossing it, the effect of each going to starboard might, in many instances, throw the vessels together by the sheer which invariably follows from such management. The consideration of that fact alone, without reference to the nautical rule on the subject, would seem to reject the theory, that in such instances the statute must apply. Vessels are to meet each other head to head or bow to bow to induce a compliance with the statute, and the extension of its provisions to any other situation of vessels, in the absence of proof showing its utility and safety, would be a dangerous exercise of judicial power. All these elements went to the jury in unexceptionable form. They were instructed not only on the legal propositions involved, which were correctly stated, but upon the questions of fact upon which they were to pass. The evidence objected to was in perfect harmony with the rule adopted by the court, and its reception unavoidable. The objection was therefore not well taken, and there being nothing in the bill of exceptions which will justify us in disturbing the verdict the judgment must be affirmed.

## CHARLES DUELL v. CHARLES CUDLIPP.

G. having, without the knowledge or consent of the owner, pledged with the defendant, a pawnbroker, property belonging to P., whether the defendant has any lien upon it for his advance—*quare?*

The pawn-ticket having been assigned to P., and notice of her ownership of the property and of the assignment of the ticket to her having been given to the defendant, he is liable to her for the value of the property, if he afterwards delivers the property to the original pledgor.

No action can be maintained by an owner of a chattel, when the assignment under which he claims transfers the property only, except for a conversion of the chattel subsequent to such assignment.

And when the transfer or assignment is made to the plaintiff after the property has passed out of the defendant's possession, a demand of it by the plaintiff from the defendant, and a refusal on his part to give it up, because he had actually parted with its possession to the person from whom he received it, does not constitute a conversion.

APPEAL by defendant from a judgment of the Third District Court. This action was brought to recover damages for the value of a diamond ring, valued at \$75 to \$80. The defendant was a pawnbroker. The ring belonged to Mrs. Estella C. Proser. It was taken by one William L. Green, whether by her authority or not was a disputed question, and pledged with the defendant, he advancing \$20 on it. Green afterwards gave the pawn-ticket to Mrs. Proser, who immediately gave the defendant notice of her ownership of the property and of her possession of the ticket, and gave him notice not to deliver the ring to any one but her, and the defendant made an entry of her claim in his book. He afterwards, however, gave it up to Mr. Green, who made the usual affidavit of the loss of the pawn-ticket. Thereafter Mrs. Proser tendered the defendant the amount of his advance, and demanded of him the ring, with which demand he was of course unable to comply. She then transferred her property in the ring to the present plaintiff, who repeated the tender and demand, and then brought this action. Judgment was rendered for the plaintiff, and the defendant appealed.

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Duell v. Cudlipp.

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*Tomlinson, Walden and Brigham*, for the appellant.

*William R. Stafford*, for the respondent.

**INGRAHAM, FIRST JUDGE.**—Whether or not Mrs. Proser agreed to permit Mr. Green to take the ring and pawn it was a question of fact for the justice, and with his finding this court ought not to interfere. Green stated that she gave permission to him to use it. Mrs. Proser says she never gave the ring to Green; that he took it without her permission or consent; and that she had no idea he would take it. The subsequent reception of the pawn ticket and offer to pay the defendant the money advanced by him were not sufficient to establish such consent. They were but efforts on her part to save the property from going back to the party who had improperly taken the ring from her. It seems to me very improbable that a person, who would not lend another \$20, would voluntarily place in his possession a ring worth \$80 to pawn.

The finding of the justice in favor of the plaintiff is based on the proof that no authority was given to Green to pawn the ring, and it may well be doubted whether the defendant had any lien upon it at all; but when he had notice of the transfer of the ticket to Mrs. Proser, and that the property was hers, that she had offered to pay the amount loaned, and that he had entered in his book notice of such claim, I think the defendant was wrong in delivering up the property to Green, and should be held liable.

Whether or not he should be allowed the amount for which it was pawned does not appear to have been discussed upon the trial. If there was no permission given to Green to take the ring, there could have been no authority to pawn it, and the defendant could obtain no title to the property; but, as this is not made a ground of appeal, it is not necessary to discuss it.

I think, however, there is a difficulty in sustaining this judgment on the facts proven.

The assignment to the plaintiff was on the 1st of February,

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1856. The action was commenced on the 5th of February, 1856. The demand, to entitle the plaintiff to recover, must have been made after the assignment. At that time the property was not in the defendant's possession, and a demand of it from him, with a refusal to give it, because it had passed out of his possession to another, did not prove a conversion. It is immaterial in this case whether Mrs. Proser could have maintained the action or not. It is clear that there has been no conversion of the property since the plaintiff has held the title to it.

In *McKee v. Judd* (2 Kernan, 622), in which the Court of Appeals held that a right of action for the conversion of personal property was assignable, the instrument of assignment was a general conveyance of all the assignor's property and estate. In the present case the assignment transfers nothing but the property, and without a demand and refusal, or a conversion after the assignment, the present plaintiff could maintain no action for the property.

The complaint in this case was for detaining a diamond pin, the answer a general denial, and the proof is conclusive that before the plaintiff had any title to the pin the defendant had parted with the possession. That an action to recover the property, under such circumstances, cannot be maintained was settled in *Roberts v. Randal*, 3 Sand. S. C. Rep. p. 707; *Brockway v. Brough*, 8 How. Pr. Rep. p. 188; and those cases have been followed by this court in several instances.

In order to have brought this case within the rule, as laid down in 2 Kernan, p. 622, the assignment should have transferred any cause of action for the conversion, as the mere transfer of the property does not give a right of action against a party who has ceased to detain it before the plaintiff's title accrued. *Hill v. Covell*, 1 Com. 522.

Judgment reversed.

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Ackerman v. Runyon.

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## JOHN ACKERMAN v. JOHN RUNYON.

In an action to recover for money lent to the defendant while an infant, his admissions of the amount received by him, though made during his infancy, are admissible as evidence of the sum loaned.

The promise of the defendant, after attaining his majority, to pay the plaintiff what he owed him, is a sufficient promise to charge him with the indebtedness, although nothing was said at the time about the amount due.

What promise, made after majority, to pay a debt previously contracted, is sufficient to charge a defendant—considered.

**APPEAL** by defendant from a judgment entered on the report of a referee. This action was to recover for money lent. The defendant pleaded infancy. The cause was referred, and the referee found that the plaintiff had lent money to the defendant to the amount of \$122; that at the time it was lent the defendant was an infant, but that after he became of age he admitted the indebtedness, and promised to pay it. The report was in favor of the plaintiff for the sum of \$122, with interest. The evidence of indebtedness consisted of the defendant's admissions while an infant. Subsequent to his becoming of age, he said to the plaintiff's salesman that he would pay the plaintiff what he owed him, but nothing was said as to the amount. This was the proof of a promise to pay, upon which the plaintiff relied to sustain a recovery.

*J. O. Halsted*, for the appellant. I. The only attempt to prove indebtedness is by an admission of the defendant while an infant. This is not competent, even to show that he was supplied with necessaries. *Ingleden v. Douglas*, 2 Starkie R. 36; *Trueman v. Hunt*, 1 T. R. 40; 4 C. & P. 104.

II. No admission or promise by the defendant, amounting in law to a ratification, is proven. 1. There should be an admission of the whole debt, and a promise to pay it. *Goodsell v. Meyer*, 3 Wend. 479; *Gay v. Ballou*, 4 ibid. 405; *Smith v. Mayo*; 9 Mass. R. 84; *Thompson v. Lay*, 4 Pick. 48; 8 N. H. R. 376.

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2. Where the defence is infancy, there must be an express ratification. *Tibbatts v. Gerrish*, 5 Porter N. H. R. 48; *Sherman v. Wakeman*, 11 Barb. 254; *Bigelow v. Grannis*, 2 Hill, 120. 3. The promise proved was at most a conditional one, and the burthen rested upon the plaintiff to prove *aliunde* the correctness of his account. *Miller v. Hewtell*, 19 Wend. 301; *Wright v. Steele*, 2 N. H. R. 52; *Quailes v. Littlepage*, 2 H. & M. 401; *Douglass v. Dane*, 2 McCord, 219; 6 Conn. R. 494; 2 C. & P. 109; 9 Mass. R. 84; 9 Verm. R. 365.

*J. F. Bowman*, for the respondent.

**BRADY, J.**—The referee found that the sum of \$122 was lent to the defendant between January, 1851, and April 2d, 1852. That during that period the defendant was an infant; and that after his arrival at the age of twenty-one years he promised to pay the sum so found to be due.

The defendant insists that the finding by the referee of the amount due is not sustained by the testimony; that the only evidence on that subject is an admission made by defendant while an infant, that the account of the plaintiff which he examined was correct; and that such an account stated is not evidence against him after his maturity, even to show that he was supplied with necessaries. The case of *Ingledew v. Douglass* (2d Starkie Rep. 33) sustains this view. Lord Ellenborough at first doubted whether the statement was not evidence to show that necessaries had been supplied, but, after consideration, was of the opinion that the statement of the account by the infant could not be used against him. No reasons are assigned in the report, and what influenced the change in Lord Ellenborough's opinion does not appear. The question has not been expressly adjudicated in this state, but I think may be considered settled on principle and by analogy. In the case of *Gay v. Ballou* (4 Wend. 403), the plaintiff proved the value of the board charged against the defendant during infancy, and examined several witnesses as to items in the bill of particulars. It was also proved

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that, prior to the defendant's majority, he was furnished with a bill of the charges of the plaintiff; that he examined it; said he did not know but that it was right, but he should like to have advice and consider it. He made no objections to pay any item in it. The bill so furnished corresponded with the bill of particulars. The proof as to the promise was, that the defendant had declared that he was willing to settle with the plaintiff, and pay him what he owed him, *if anything*. The court held that the admission of the defendant afforded sufficient evidence that the items of the plaintiff's account were paid or furnished at his request. It is true, the court decided that an express promise need not be proven in order to render an infant liable for necessaries; and that if the demand is not for necessaries, and the issue made upon a new promise after maturity, an express promise must be proved; but that does not affect the immediate question under consideration. The only admissions relating to the *items* of the plaintiff's account were made prior to full age, and they, united with the promise to pay *if he owed anything*, were considered sufficient to charge him. This case, in that respect, is stronger than the one referred to. The account was admitted by the defendant, during minority, to be correct, without qualification, and the subsequent promise, after he became of age, to pay what he owed, is free from any hypothesis.

Again, in the case of *Haile v. Lillie* (3 Hill, 149), Lillie, an infant, sued Haile, for work, &c. On the trial evidence was given tending to show that a settlement had taken place between the parties, but the defendant insisted that no such settlement had taken place, and offered to prove the fact by the *admission of the plaintiff*. The testimony was rejected, but the judgment was reversed—Chief Justice Nelson declaring that “the admissions of the plaintiff were evidence against him, though the admissions of an infant may frequently be controlled by the infant's incompetency to bind himself by contract.” And again, “The only privilege of an infant, who has arrived at years of discretion, even in civil cases, is an exemption at common law from *liability* upon most of his contracts. Independently of this

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privilege, he stands in court upon the footing of an adult." This is undoubtedly the correct doctrine. The admissions of an infant are evidence against him for certain purposes, although such admissions do not create any liability. The mere admission of the correctness of the account would establish only that the plaintiff and defendant had transactions together, and that the result of such transactions left a balance due to the plaintiff without increasing the defendant's liability to pay it. Without a promise to pay after maturity, the admission would be wholly immaterial for any purpose. There is no difference in principle between an admission of the correctness of an account and any admission affecting a material fact, such as the denial of a settlement by the infant, between him and his employer, the only object of which would be to show that the balance struck was not agreed upon. I can discover no reason why an admission, by an infant of discreet years, of the correctness of an account, should not be permitted to show the inchoate debt, which became absolute by promise after maturity. The referee's finding, therefore, on that question must not be disturbed.

The defendant also excepts to the finding of the referee, that the defendant promised to pay the account after his maturity, which he admitted to be correct, but the conclusion of the referee on that subject must be upheld. The promise to pay was made in July or August, 1852. The promise was an express one; more express, indeed, than the promise proved in *Gay v. Ballou, supra*, and yet that was held sufficient. In *Bigelow and others v. Grannis* (2 Hill, 120), the promise was made to a stranger, and the court held that it must be made to the plaintiff or his agent. The same doctrine was declared in *Goodsell v. Myers* (3 Wend. 481), but of the sufficiency of the promise no doubt was expressed. In neither of these cases was the promise express, though given to a stranger, and it was not therefore so legally formidable as the promise proved here. There is no reason for interfering with the report of the referee.

I remarked during the argument of this appeal, and have not changed my opinion since, that the only question of any im-

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portance was, whether the debt was sufficiently proved? I am satisfied that it was, for the reasons stated, and think the judgment is right, and should be affirmed.

Judgment affirmed.

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JOHN A. URSDELL and others *v.* HARMAN K. ROOT.

An order to refer a cause, brought upon an account for goods sold and delivered, is not an appealable order.

When a party has proceeded, under an order of reference, with the trial of the cause before the referee, he cannot afterwards appeal from the order.

MOTION to dismiss an appeal. This was an action to recover for goods sold and delivered. The account of sales contained ten items. When the cause was reached upon the calendar for trial, the plaintiffs' attorney moved for an order of reference, which was granted. A sole referee was agreed upon between the attorneys for the respective parties, and the order was entered accordingly.

The cause was then noticed by the plaintiffs' attorney for trial before the referee. The defendant's attorney attended pursuant to the notice, and without objection proceeded with the trial. The first session lasted some four hours, and was taken up with the examination and cross-examination of witnesses for the plaintiff, called to prove the sale of the goods. After this the defendant appealed from the order of reference, and this appeal the plaintiff moved to dismiss.

*D. McMahon*, for the motion. I. The order of reference is not appealable. *Gray v. Fox*, 1 Code R., N. S. 334; *Bryan v. Brennan*, 7 How. Pr. R. 359; *Dean v. Empire Mut. Ins. Co.*, 9 *ibid.* 69. II. The appearance of the defendant's counsel before the referee is a waiver of any objection to the order of reference. *Renouil v. Harris*, 1 Code R. 125; *Comb v. Wykoff*, 1 Caines' R. 147.

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*Charles S. Sanford*, opposed.

INGRAHAM, FIRST JUDGE.—The order of reference in this case was made on motion for that purpose. The cause is one in which a reference may be made without the consent of parties—it being an action on contract. Where such is the case, it rests in the discretion of the judge who hears the motion whether to refer it or not, and the exercise of such discretion is not the subject of review by the general term as a matter affecting the merits. We have provided for reviewing such orders, when the party aggrieved obtains the judge's certificate that the question involved is of sufficient importance or doubt as to warrant such review. As no such certificate was obtained, we think the order appealed from was not an order involving the merits, and that no appeal will lie from it. The cases cited (*Gray v. Fox*, 1 Code Rep., N. S. 334; *Bryan v. Brennan*, 7 How. Pr. R. 359; *Dean v. Empire Mut. Ins. Co.*, 9 ibid. 69) are in point.

Even if it was an appealable order, the defendant, by appearing on the reference and proceeding with the trial, has waived any right to appeal. If he had still intended to prosecute the appeal, he should have applied for a stay of proceedings. It can hardly be considered as proper, or consistent with a due administration of justice, after the parties have appeared and tried a cause on the merits, that the court would set all the proceedings aside upon a mere question of practice.

It also appears from the papers that the referee was agreed upon between the parties, and the subsequent proceedings on the reference abundantly show that the reference was necessary.

The motion is granted.

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Moss v. Shannon.

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MEDAD T. MOSS *v.* JOSEPH SHANNON.

The payment of a part of a judgment-debt, and the giving of the debtor's own notes for a part of the balance, will not, without a satisfaction or release, discharge the indebtedness, although received in full payment and satisfaction.

And it makes no difference that the notes were made payable to the attorney of the creditors, who is acting for and on their behalf, instead of being made payable to them directly.

In an action upon a judgment, by the assignee of the judgment-creditor, it is not necessary to aver any demand of payment by the assignee, or any refusal to pay by the debtor.

APPEAL by defendant from an order at special term sustaining a demurrer to a part of defendant's answer. This was an action to recover a balance of \$233.39, upon a judgment for \$508.79, recovered by Elam Hurd and Julius T. Alden against the defendant and assigned to the plaintiff. A part payment of the judgment was admitted by the complaint. The answer set up, as one of the defences, that subsequent to the recovery of judgment the defendant gave to one Henry Hurd, acting for and on behalf of Elam Hurd and Julius T. Alden as their attorney, \$125 in cash, and three notes for \$50 each, made payable at the Butchers' and Drovers' Bank, which he agreed to take in full satisfaction, payment and discharge of the judgment, provided the notes were paid at maturity. That the notes were paid at maturity, and the judgment thus satisfied and discharged. To this part of the answer the plaintiff demurred, the demurrer was sustained, and the defendant appealed.

*F. Byrne*, for the appellant. I. No notice of the alleged assignment is averred, nor is there any averment in the complaint of a demand on the defendant, or a refusal on his part to pay the balance claimed to be due. *Sears v. Patrick*, 23 Wend. 528. II. The notes given were made payable to the order of Henry Hurd, a third person, and were made payable at the Butchers' and Drovers' Bank. The payment being thus made to

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a third person, and at a particular place other than the place where the debt would have been payable, it is good as a satisfaction. 2 Coke's Institutes, 212, b.

*W. H. Green*, for the respondent. I. The payment pleaded being of a sum less than the amount of the judgment, is not good either as a plea of payment or of accord and satisfaction (*Dedrick v. Lehmann*, 9 Johns. R. 333), and could not be received in evidence under a plea of payment. *Mechanics' Bank v. Hazard*, 13 Johns. R. 353; *Seymour v. Minturn*, 17 ibid. 169; *Johnson v. Brannan*, 5 ibid. 271.

II. A debt by speciality cannot be satisfied by a lower form of security from the debtor himself. *Worthington v. Wigby*, 8 Bingh. N. C. 454; *Waydell v. Luer*, 5 Hill, 450, 458; *Mitchell v. Hawley*, 4 Denio, 414; See *Gunn v. McAdam*, 2 Iredell Eq. 79.

III. A debtor's own promise to pay, even for the full amount, though by express agreement taken in full payment and satisfaction of the debt, cannot *per se* operate as payment or satisfaction of the prior indebtedness. See the following cases: *Hughes v. Wheeler*, 8 Cow. 79; *Booth v. Smith*, 3 Wend. 68; *Frisbee v. Learned*, 2 Wend. 452, *per* Cowen, J.; *Conkling v. King*, 10 Barb. 375; *Cole v. Sackett*, 1 Hill, 516; *Waydell v. Luer*, 5 Hill, 448; S. C. 3 Denio, 410; *Elwood v. Diefendorf*, 5 Barb. 408; *Livingston v. Radcliff*, 6 Barb. 201; *Courvo v. Port Henry Iron Co.*, 12 Barb. 27.

IV. There being no consideration for the alleged agreement to accept a partial payment in satisfaction of the judgment, there must have been either a satisfaction or a release under seal, to discharge the defendant. *Seymour v. Minturn*, 17 Johns. R. 169; *Dewey v. Derby*, 20 ibid. 462; *Jackson v. Stackhouse*, 1 Cow. 122; *Dezeng v. Bailey*, 9 Wend. 336; *Barnard v. Darling*, 11 ibid. 28; *Tunick v. Greene*, 5 ibid. 455; *Mitchell v. Hawley*, 4 Denio, 414.

**INGRAHAM, FIRST JUDGE.**—This action is brought upon a judgment for \$508.79. The defendant sets up in his answer that

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by agreement with the plaintiff's assignors he paid \$125 in cash, and gave his notes for \$150, in satisfaction and discharge of the judgment. To this the plaintiff demurs. The payment of part of a debt, and giving the debtor's note for part of the balance, can never discharge the whole indebtedness without a release. The debtor's note amounted to nothing. He only agreed by it to pay at a future time what he was bound to pay at the present moment, and afforded no new consideration for any contract at the time. The giving of notes of other persons might have a different effect. See *Mitchell v. Hawley*, 4 Denio, 411; 8 Cow. 79; 3 Wend. 68; *Cole v. Sackett*, 1 Hill, 516; and in *Waydell v. Luer*, 5 Hill, 448, and 3 Denio, 410, where this question was fully examined; and it was conceded by all the judges that the mere note of the debtor would not discharge a precedent debt, though it might suspend the remedy. 3 Bingh. N. C. 454.

It is said that a difference exists between this case and those above referred to, because the contract was made with Henry Hurd. Without expressing any opinion upon the question, whether the giving of the debtor's note to a third person, although for a smaller amount, would operate to discharge the original indebtedness either in whole or in part, it is sufficient for this case to say, that the answer admits that Henry Hurd was acting for and on behalf of the plaintiff, and as his attorney. His acts, therefore, were the acts of the plaintiff, and the notes, although made payable to Henry Hurd, were, in fact, the property of the plaintiff, and payable to him.

It was unnecessary to prove any demand on behalf of the assignee, or refusal to pay of the debtor. The case cited is not in point. It only applies to cases where the defendant received the money sued for in the capacity of trustee, and in which a demand might have been as necessary for the assignor as for the assignee.

The order on the demurrer made at special term should be affirmed.

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Sherman v. Elder.

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GEORGE M. SHERMAN v. GEORGE ELDER, WILLIAM R. PAINTER  
and CHARLES F. LINEBACK.

In an action to recover damages for the conversion of personal property by the assignee of the original owner, the complaint must either show an assignment to the plaintiff of the original owner's claim for damages, or an assignment of the property and a demand thereof by the plaintiff subsequent to the assignment.

The wife having, subsequent to her marriage, permitted her sole and separate property to be transferred to the custody of her husband, and used in a business carried on by the two, whether she will not be held to have appropriated it to the use of her husband, and rendered it liable to the claims of his creditors—*quare?*

The sheriff having, in such a case, levied on a stock of goods purchased with the income of such a business, and the wife having interposed only a general claim to the entire stock, whether she will not be afterwards estopped from claiming a few specific articles, upon the ground that they were hers at the time of her marriage, no such claim having been made at the time of the levy—*quare?*

Whether a wife can, without the concurrence of her husband, assign a claim for damages for a *tort*—*quare?*

APPEAL by defendants from a judgment entered on the report of a referee. This action was brought to recover damages for the conversion of personal property. The complaint averred the taking and carrying away, by the defendants, of certain personal property belonging to one Lucy Sherwood, and that prior to the commencement of the action she sold the property so taken to the plaintiff. It neither averred a demand subsequent to that assignment by the plaintiff on the defendant, nor did it aver that she had assigned to the plaintiff her claim for damages against the defendant. The defendants justified under an execution issued against one Daniel Sherwood, Lucy Sherwood's husband. The value of the articles claimed was about seventeen hundred dollars.

Upon the trial it appeared that Lucy Sherwood, prior to and at the time of her marriage to Daniel Sherwood, was keeping a grocery store on the corner of Hudson and Charles streets, New York city, the contents of which were her sole and separate property. In January, 1850, she married Daniel Sherwood, and

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changed the sign, putting up the name of L. Sherwood over the door. The two continued to carry on the business together, the goods being purchased from the income of the store. In September, 1858, Daniel Sherwood confessed judgment to the defendants, Elder and Painter, for goods furnished to the store. Under this judgment an execution was levied by the defendant Lineback, a deputy sheriff, on the contents of the store. It was for the sale under this execution that this action was brought by the plaintiff, as the assignee of Lucy Sherwood. The referee found that a few of the articles levied upon, in value \$66, were the separate property of Lucy Sherwood, being specific articles which belonged to her at the time of her marriage. As to the rest, he found that they had been purchased since the marriage from the income of the store.

It appeared that at the time of the levy the sheriff was notified that Lucy Sherwood claimed the entire stock of goods, but it did not appear that he was informed that any portion of them had belonged, in specie, to her prior to the marriage; or that the articles which so belonged to her were distinguished in any way from the rest.

Upon the trial the defendants moved for a dismissal of the complaint for insufficiency of proof, which was denied. The referee reported in favor of the plaintiff for the sum of \$66, and from the judgment entered on that report the defendants appealed.

*Richard M. Harrington*, for the appellants. I. The referee should have dismissed the complaint. 1. There was no evidence of any demand by the plaintiff after the assignment to him. *Sherman v. Wells*, 18 Barb. S. C. R. 500; *Hall v. Robinson*, 2 Com. 293; *Robinson v. Weeks*, 6 How. Pr. R. 161; *Cass v. N. Y. & H. R. R. Co.*, 1 E. D. Smith's C. P. R. 522; *Howell v. Kruen*, C. P. Ms., Woodruff, J.; *The People v. Tioga C. P.*, 19 Wend. 73; *Gordon v. Adams*, 12 Wend. 297. 2. There was no evidence as to the value of the articles.

II. The business carried on was, in law, the business of the husband. *Lovett v. Robinson*, 7 How. Pr. R. 105; *Van Sickel v.*

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*Van Sickel*, 8 How. Pr. R. 268; *Russell v. Gibson*, 8 ibid. 456; *Howland v. Fort Edward Co.*, 8 ibid. 505; *Martin v. Martin*, 1 Com. 473. And the wife having made an appointment of this property to the business, or to her husband, she surrendered her prior title to them, and left nothing to pass by her pretended assignment to the plaintiff. *Vanderhyden v. Mallory*, 1 Com. 452; *Merritt v. Johnson*, 7 Johns. 478; *Gregory v. Stryker*, 2 Denio, 628; *Andrews v. Durant*, 1 Kern. 35.

*W. H. Bell*, for the respondents.

**INGRAHAM, FIRST JUDGE.**—The defendant moved for a dismissal of the complaint for insufficiency of proof. On his points he states that there was no evidence of demand by the plaintiff after the assignment to him, and that there was no direct evidence of value.

The complaint is simply a claim for damages for taking property of Lucy Sherwood, while it only avers an assignment by Lucy Sherwood to the plaintiff of the articles so taken. It sets up no assignment of a claim for damages for the taking.

Under this complaint there could be no recovery for any trespass, except for that while Lucy Sherwood owned the property, and no such claim is assigned according to the pleadings. The objection was a much broader one than stated by the defendant's counsel, for no cause of action was shown by the complaint to exist in Sherman. It neither averred an assignment by Lucy Sherwood of any claim for damages for the taking nor a demand of the property for the plaintiff after the assignment; one of which was necessary to give the plaintiff a cause of action. The proof, therefore, of the plaintiff's claim was insufficient when the motion was made. The Court of Appeals have lately held that a claim for damages for taking personal property is assignable. *McKee v. Judd*, 2 Kernan, 622. In that case the complaint averred that the claim and demand for taking the property was assigned to the plaintiff, and not the title to the property merely.

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For this reason we think the case must go back to the referee. If the plaintiff sees fit to move for an amendment of the pleadings, the objection may be remedied; but as the complaint now stands there can be no recovery in the plaintiff's favor.

A more serious objection exists to any recovery in this case. After the wife's marriage, she permitted this property to be transferred to the custody of the husband—the business to be carried on generally by him, and in his name, and the moneys used at his pleasure in renewing the stock from time to time. She may be considered as having appropriated this property to the use of the husband, and thereby exposed it to the claims of his creditors. She was present when her husband stated it had all been put in his possession by her as a part of the general stock, and did not dissent therefrom.

She should have made a specific claim for these articles, instead of claiming the whole stock, and more particularly so when the sheriff told her he did not wish to levy upon anything she had when she married. She did not specify anything, but claimed the whole. Under the circumstances, it may well be said that she was estopped from afterwards setting up this claim.

I make these remarks rather as suggesting them for the consideration of the referee, if the case shall again be brought to a hearing, than as necessary at the present time to the decision of this appeal.

There is also a difficulty as to the propriety of the assignment, by the wife, of this claim, without her husband. That a wife could not assign such a claim at common law without the privity and concurrence of her husband is undoubted, although courts of equity will sustain such conveyances when her intention so to do is made apparent. Whether this rule can be extended to a claim for damages for a tort, is a question not free from difficulty.

The report must be set aside, and cause referred back to the referee. Costs to abide the event.

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Ogden v. Blydenburgh.

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**JAMES L. OGDEN and ISAAC C. OGDEN v. JEREMIAH W. BLYDENBURGH.**

An indorsement of a promissory note is a guaranty of the genuineness of the previous signatures, and of the capacity of the parties thereto to contract. Therefore, in an action against the endorser of a promissory note, it is no defence to show that the payee and prior endorser was a married woman. The capacity of a married woman to endorse paper made payable to her order, considered.

APPEAL by defendant from a judgment entered by direction of the court upon a trial without a jury. The facts sufficiently appear in the opinion of the court.

*J. W. Blydenburgh*, appellant, in person.

*John Moody*, for the respondents.

**BRADY, J.**—This action was brought to recover from the defendant, as the second endorser of a promissory note. The defendant offered to show that the payee and first endorser was a married woman. The presiding judge excluded the proof as wholly immaterial, and the defendant appealed. Whether it was material or not is the only question involved.

Prior to the statutes of 1848 and 1849, a bill made or indorsed to a *feme sole*, who afterwards married, could be endorsed only by the husband (3 Kent, 88 [3d edition]; 1 Parson on Contracts, 212, and cases cited), and the same rule applied where the note was given to her, or made payable to her after coverture. *Ibid.* and Story on Contracts, p. 98, and cases cited; Comyn on Contracts, 787, New York ed. 1835. A note, therefore, endorsed by a married woman was void. Comyn, *supra*. The statutes of 1848 and 1849 may have changed the rule in relation to notes acquired *before marriage*, but have not as to notes made payable to the wife during coverture, in all cases, as we shall presently see.

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Those statutes apply to property acquired after marriage by gift, grant, or devise from any person other than the husband, but do not apply to anything acquired by services performed, or in the transaction of a separate business carried on by the wife, except where peculiar circumstances exist—that the husband had abandoned and deserted his wife, or was civilly dead, from conviction for crime, or the like. Such goods or property would be subject to the debts of her husband. *Lovett v. Robinson and Witbeck, &c.*, 7 How. 105. Her credit and business talent belong to the husband. 7 How., *supra*. And those statutes have not removed the common-law disability of a married woman to make valid executory contracts, unless they relate to her separate property. *Cobine v. St. John, &c.*, 12 How. 325. But these conclusions are not applicable in an action like this, brought against a second endorser. Nothing is better settled in the law than that it is only necessary for the plaintiff to prove the indorsement required to convey title to himself, and that such indorsement is a guaranty of the genuineness of the previous signatures, and of the capacity of the parties to contract. 2 Greenleaf, 166, and cases cited; Chitty on Bills (8th ed.), 588; Story on Promissory Notes, p. 145, and cases cited.

The existence of any other rule would be attended with serious consequences, and would impose upon the commercial world obligations on the receipt of negotiable paper which would destroy its utility. There was no pretence that any other defence existed. The defendant admitted that he had no other evidence than that offered, and that was designed to show that the previous endorser, whose capacity to contract he guarantied, was a married woman. For these reasons the judgment cannot be disturbed.

Judgment affirmed.

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Griffin v. Rice.

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PHILLIP N. GRIFFIN, assignee, &c., v. JOHN RICE, President of the Atlantic Bank in the city of New York.

It is not necessary that a witness should be an expert in banking in order to prove a usage of banks. If he knows the usage he is competent to testify to it, whether he is a banker or employed in a bank, or is accustomed to deal with banks.

A bank has a right to pay notes or checks for a dealer at his request, even after he has made a general assignment for the benefit of his creditors, until notice of such assignment is given to it.

And such a payment is good as a set-off in an action by the assignee against the bank, for a balance of account due the assignors at the time of the assignment, upon collaterals left with notes for discount.

A direction in a note, making it payable at a given bank, is equivalent to a request to the bank to pay it.

APPEAL by defendant from a judgment of the Marine Court. This action was brought by the plaintiff, as assignee of C. S. Benedict & Co., to recover \$337.92 from the Atlantic Bank, being a balance of account of theirs with the bank. C. S. Benedict & Co. left for discount with the bank, in the spring of 1854, two notes for the aggregate amount of a little over \$1,500, leaving, as collateral, notes for about \$1,900. In September, 1854, C. S. Benedict & Co. failed, and made an assignment for the benefit of creditors to the plaintiff. On the 4th of October, and before notice of the assignment had been given to the bank, a note of Benedict & Co.'s for \$612.58, payable at the bank on that day, was presented there for payment, and was paid by the bank. Benedict & Co. had, at the time, a balance of only some \$5 or \$6 on their account, beside the collaterals. The bank afterwards collected the entire amount of the collaterals, and after repaying themselves the amount of the discounted notes, had an admitted balance in Benedict & Co.'s favor of \$370.50, for which this action was brought. To this action they claimed, as an offset, their payment of Benedict & Co.'s note on the 4th of October. This claim was disallowed by the court below, who rendered judgment for the plaintiff, from which the defendant appealed.

*Charles Tracy*, for the appellant.

*Horace Dresser*, for the respondent.

INGRAHAM, FIRST JUDGE.—The plaintiff's claim is for moneys received by the bank upon collateral notes, deposited as security for other notes discounted by the bank for the firm of C. S. Benedict & Co. Before the notes were paid this firm had failed, and made an assignment to the plaintiff. After the assignment, the bank, without notice, paid a note of Benedict & Co., which was made payable at the bank, and they claim to be allowed, as an off-set, the amount of such note.

Upon the trial of the case, the plaintiff was permitted to call as witnesses, as to the custom of the banks in New York in paying the checks of dealers, persons who were not employed in banks. Although not employed in banking business, the witnesses were dealers with the banks, and had knowledge of the ordinary course of dealing with them. There is no necessity for showing a man to be an expert in banking, in order to prove a usage. He should know what the usage is, and then he is competent to testify, whether he be a banker, or employed in a bank, or a dealer with banks. There is no reason why a dealer should not have as much knowledge on such a subject as a person employed in a bank.

The main question in this cause is, whether the bank is entitled to credit for the amount of the note of Benedict & Co. paid by the bank.

As between Benedict & Co. and the bank, I think there could be no doubt that the defendants should succeed in the defence set up by them. The payment of the note was by direction of the firm, inasmuch as they made it payable at the bank. Such a direction as to the place of payment, where the firm's account was kept in the bank, was equivalent to a direction or request for the bank to pay the same. Even conceding that the collaterals were not pledged as security for such payments, and that the bank could not have retained the notes after those to which they were

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collateral had been paid, still when the collaterals are paid, and the claim is for money had and received, a set-off is always proper. While the money was remaining with the bank, and before any notice of the transfer of interest to the plaintiff was given to the bank, they, at the request of Benedict & Co., paid the note of that firm. Such payment was a good defence to any claim for money collected by them on the collaterals, either as a payment for the firm out of those funds by their request, or as a set-off of the amount of the note for moneys paid for them at their request.

Is there anything, then, in the fact of the assignment to the plaintiff to alter the rights of the defendants to this defence.

Had notice of the assignment been given to the bank, a different question would arise, but without such notice the bank was justified in making the payment, just as much as they would have been in paying a check drawn by the firm upon the bank.

I do not think it necessary to examine the question as to the right of the bank to hold collaterals for other debts than those for which such securities were specially pledged. I am disposed to put this case on the broader ground of the right of the bank to pay notes and checks for the dealer, at his request, even after he has made an assignment, until notice of such assignment is given to the bank.

The proposition is a monstrous one, that banks, receiving money of and for their dealers, to be paid out on their checks and notes, are not to be protected as to payments made by them in the ordinary course of dealing of such banks, when the dealer sees fit privately to make an assignment of his effects, and the notice of such assignment is withheld from the bank.

The judgment for the plaintiff was erroneous, and should be reversed.

RICHARD FIELD *v.* JOSEPH PAULDING and NATHANIEL HAWXHURST.

JOSHUA H. BROWN and others *v.* THE SAME.

Executions were issued in May, 1848, in these cases, on judgments then recovered in this court. The executions, by mistake, purported to be issued on judgments in the Supreme Court. This error was not discovered until after a sale under the executions, and an acknowledgment thereon of payment. Subsequently, and in 1851, an order was made, on application of the plaintiffs, granting leave to issue new executions, but none were issued until 1856.

Held, that such executions were irregular, and must be set aside. The application, for leave to issue execution for the purpose of removing the bar of section 284 of the Code, cannot be made until after five years from the date of the judgment. After five years the law presumes that the judgment has been paid; and such presumption is not removed by an order made prior to that time.

APPEAL by defendants from an order at special term denying a motion to set aside executions as irregularly issued. The facts appear in the opinion of the court.

*J. and R. H. Sherwood, for the appellants.*

*S. Sanxay, for the respondents.*

INGRAHAM, FIRST JUDGE.—In these actions judgments were docketed in April, 1848. Executions were issued to the sheriff of Ulster county in May, 1848, upon which certain land was sold, and the plaintiff was the purchaser. On receiving certificate from the sheriff, he endorsed on the executions an acknowledgment of payment. It was subsequently discovered that the sale was void, because the executions purported to be on judgments in the Supreme Court.

The plaintiffs then applied to this court in January, 1851, for an order allowing the plaintiff to issue new executions to the sheriff for the whole amount of the judgments. This motion

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was granted about April, 1851. The propriety of such a course was sanctioned in *Suydam v. Holden*, Court of Appeals, October, 1853.

In February, 1856, new executions were issued, and the defendants now move to set these aside, upon the ground that they were issued after the lapse of more than five years from the date of the judgment, without leave of the court.

In the first instance the executions were undoubtedly a nullity. The sale was void, and the whole proceeding might have been disregarded, and executions upon the judgments issued, but that did not preclude the plaintiffs from making the motion which they did, for an order of the court allowing them to issue executions anew, and thereby relieving themselves from the consequences of the erroneous proceedings upon the former executions. They had the power to issue executions at any time within five years after the date of the judgment, without any order of the court. Section 283 of the Code expressly provides for such a case, whether the judgment had been recovered theretofore or should be thereafter.

The question then arises, whether, after the lapse of five years, the plaintiffs should have applied for leave to issue execution, or whether the order made in 1851 can be considered as a substitute for such permission.

I cannot adopt the conclusion that the order of April, 1851, made for the purpose of avoiding the irregular proceedings on the first executions, can have the effect of satisfying the provisions of section 284 of the Code, and thereby sanctioning the issue of the last executions, although more than five years from the date of the judgments had elapsed. That section provides that, after the lapse of five years from the entry of the judgment, an execution can be issued only by leave of the court, upon motion, with personal notice to the adverse party. To obtain such leave, it is necessary that satisfactory proof should be furnished that the whole or part of the judgment was due. The intent of this section evidently was, that if no execution issued before five years had expired from the date of the judgment, proof should

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be furnished at that time of the amount remaining due upon the judgment, before the execution should be issued.

The order of 1851 was not intended for this purpose. A perusal of the papers must satisfy any one that the object of the order was, to get rid of the proceedings on the erroneous executions. The fact that two years had expired did not render the order necessary, because, as I have shown before, the execution might have been issued within five years without such order—and no other object could have been intended. My construction of that section is, that the application can only be made after five years have elapsed from the date of the judgment. The law supposes the judgment to be unpaid for five years. After that time it presumes payment, and requires the plaintiff to show by proof that the judgment, either in whole or in part, is still unpaid. The defendant, on such an application, has a right to be heard as to what is remaining unpaid upon the judgment, after the lapse of five years from its date. If he is concluded by an order made before two years have elapsed, the object of the section is defeated.

I think the order at special term should be reversed, and the motion to set aside the executions granted; but, as the question is new, no costs should be allowed on this motion to either party.

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WILSON SMALL *v.* PETER G. LUDLOW AND GEORGE WHITEFIELD.

Assignees in trust for the benefit of creditors cannot assign a claim due to them, as trustees, to a third person to collect the claim, and appropriate the proceeds in accordance with the provisions of the original assignment. The assignment devolves a personal trust upon the assignees which they cannot thus delegate to others.

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Nor does it help such an assignment that the *cestui que trust*, under the original assignment, who will, probably, absorb the entire proceeds, have joined in the assignment of the claim, and assented thereto, unless all the creditors of the original debtor have joined therein. When a debtor assigns property for the benefit of his creditors, they are all interested in the estate thus appropriated, and no diversion can be made of the trusts thus created, nor any delegation of any power conferred, without their assent, or the sanction of some tribunal possessing the power to allow such diversion or transfer.

APPEAL by plaintiffs from an order at special term sustaining a demurrer to complaint. The facts sufficiently appear in the opinion of the court.

*A. C. Morris*, for the appellant.

*Augustus Schell*, for the respondents.

BRADY, J.—Patrick McAuliff assigned to Wm. H. Merrill, Jr., and Thomas Pearson, all his right, title and interest, in and to a building on Fifty-first street, the materials composing the same, and all other materials and property upon the lot on which such building, partially finished, had been erected, and either attached to the same, or lying loose thereon; and also his right and interest in and to the privilege of removing said materials granted to him by the school officers, who are mentioned in the assignment as having made a contract with him in relation to the erection of such building; in trust, however, to remove the said materials with all convenient speed, and to sell and dispose of the same without unreasonable delay, and the proceeds thereof, after deducting the costs and expenses of said removal and sale, and all other expenses necessarily incurred in and about the same, to appropriate to the payment of the debts of the assignor, and in the order in which they stood in schedule "A," and the surplus, if any, to other debts. Pearson and Merrill afterwards agreed with the defendants to relinquish all their right and interest to the building and materials, upon certain conditions; and the defendants were to pay for the same the sum of \$1,100.

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The defendants took possession of the building and materials, and used them for their own purposes, and under and in pursuance of such agreement. Pearson and Merrill subsequently, and on the 28th June, 1855, by deed of assignment, under their hands and seals, duly executed, assigned and transferred to the plaintiffs all their *claims as trustees* against the defendants, *in trust*, to receive what might be due from said defendants, and *to appropriate the same in the manner provided for in the assignment from McAuliff to them*, and to which assignment Patrick McAuliff, John McAuliff, Timothy McAuliff and Candee, Merrill & Co. assented. These facts are gathered from the complaint, in which it is also alleged that these persons so assenting are the only *other* persons interested in said claim. It appears, however, by the assignment of McAuliff, which is made a part of the complaint, that John Quinn, Thomas Quinn and Thomas Grogan are creditors in schedule "A," to be paid in the order in which they stand, out of the proceeds of the sale of the assigned property.

The defendants demur to the complaint upon two grounds: 1st. That there is a defect of parties, plaintiff and defendants; because it appears that the right of action, if any, is in Pearson and Merrill, assignees of McAuliff, who should have been made parties instead of the plaintiff; because the assignment was made by Pearson and Merrill without consideration or authority, and transferred no interest or right of action to the plaintiff, and because other persons are interested in the subject matter who are not made parties plaintiffs or defendants.

2d. Because the complaint does not state facts sufficient to constitute a cause of action.

Judge Ingraham, at special term, held the demurrer to have been well interposed, upon the ground that Pearson and Merrill, being trustees, and having only limited power conferred by the assignment, had no authority to substitute other trustees without the consent of all the parties in interest. It will be perceived that the trust was to sell the property after collecting it, and to appropriate the proceeds to the payment of the debts

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designated in the order in which they were arranged, and the surplus, if any, *to all other debts of the assignor*. The assignees sold the property to the defendants on a credit, in violation of law (Burrill on Assignments, pages 452, 453, and cases cited), and then again assigned the claim created by such sale to the plaintiff, *in trust, to apply it as they were required to appropriate it under the assignment to them*. It does not matter what is admitted by the demurrer, if, on consideration of all the facts divulged by the complaint and oyer, it appears that no right of action existed in the plaintiff. The authority to apply the amount of the claim is an express delegation of the power to appropriate given by the original assignment, which was a personal trust and confidence, and could not be delegated. Hill on Trustees, 178 *et seq.* The assignment executed by Pearson and Merrill was, in fact, nothing more than a delegation of power. It was not a sale of the claim, but an authority to collect and apply it, and, being void, conferred no interest in, or authority over the claim. It is said that, where a deed expressly directs the assignee to sell by public auction, the trustee is bound to conform to that mode of sale, and cannot adopt any other, although by so doing he may, in reality, promote the interests of those for whom he acts, and that he must, in general, follow the provision of the trust deed. Burrill, *supra*; 7 Paige, 37, 38; 1 Peters, 38; and in *Hawley v. James*, 5 Paige, 318, 323, 487, it is said by Chancellor Walworth, that trustees with *discretionary power* may entrust an agent with authority to make conditional sales of lands, lying *at a distance from the residence of the trustees*, subject to a ratification of such trustees or any two of them. There is no reason why he should, after the sale of distant property, however, delegate the authority to appropriate the proceeds. That is *his duty*, to be done within a reasonable time, and in the manner directed by the deed. It is no answer to this view that the assignor and the *cestui que trusts*, who will, probably, engross the whole of the proceeds, have united in the transfer, because the assignment is in trust for all the creditors of the debtor, and who thus acquire an inchoate interest in the estate

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which is transferred for their benefit, whether it ever become absolute or not. It might appear, too, on a careful execution of the trust by the assignees, that debts to be paid in priority to those of John and Thomas Quinn, and Thomas Grogan, were not, in fact, due, and they, in that event, would become entitled to their respective debts. At all events, it seem very clear to my mind, that when a debtor assigns property for the benefit of his creditors, they are all interested in the estate thus appropriated, and that no diversion can be made of the trusts created, and no delegation of any power conferred be made, without their assent or the sanction of some tribunal gifted with power to allow such diversion or transfer. On the grounds, therefore, assumed by Judge Ingraham, I think the demurrer was well pleaded, and that the order of the special term should be affirmed.

Order affirmed.

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#### JACOB CARPENTER v. JOHN TAYLOR.

A restaurant is not an inn, so as to subject the keeper to the liability of innkeepers. In order to charge a party as "innkeeper," it should appear that his premises were kept as an inn for the accommodation of travelers. A person who enters a restaurant for a meal is not to be deemed a guest or traveler entitled to the protection which the law gives against innkeepers.

APPEAL by plaintiff from a judgment of the Sixth District Court. This action was brought against the defendant, the proprietor of Taylor's International Hotel, in Broadway, to recover the value of an opera glass, left by the plaintiff in the saloon of that hotel, and there lost. The evidence showed that the plaintiff came into the saloon to get refreshments between twelve and one o'clock at night, and left the opera glass when he went out, at which time the saloon was being closed. That a friend, who was with him, called early the next morning, but it was nowhere to be found. Judgment was rendered for the defendant, from which the plaintiff appealed.

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*D. T. Walden*, for the appellant, that the defendant was liable as an innkeeper, cited the following authorities: Edwards on Bailments, 391, note 1, and *post*; *Mason v. Thompson*, 9 Pick. 280; *Clate v. Wiggins*, 14 Johns. R. 175; and that the defendant was a guest, he cited Edwards on Bailments, 393; *Bennett v. Miller*, 5 Tenn. R. 273; *McDonald v. Edgerton*, 5 Barb. R. 560.

*L. F. Cozans*, for the respondent, cited 2 Kent's Com. 594-6; *Calye's case*, 8 Co. 32; *Thompson v. Lacy*, 3 B. & Ald. 283.

**INGRAHAM, FIRST JUDGE.**—The evidence on the part of the plaintiff shows that he went into the defendant's place in Broadway, known as the International Hotel, to get refreshments. That he went into the saloon, and, on leaving it, left behind him an opera glass of the value of \$40. That in the morning he returned there, and it was not to be found.

There was evidence on the part of the defence tending to show that the glass was not left there.

No evidence was given as to the character of defendant's building or employment, other than the name of his establishment. The justice rendered judgment for the defendant.

Whether the glass was or was not left in the saloon was a question of fact for the justice; with his finding on that subject the court would not interfere. In his first return he says that he was satisfied the glass was left there.

There are two grounds on which the defendant is sought to be held responsible:

1st. On the ground that the lost property was received by the defendant's servants.

2d. On the ground that the defendant, being an innkeeper, was liable for the goods of his guests stolen on the premises.

As to the first point, the evidence by no means shows that the property ever came to the possession of any of defendant's servants. On the contrary, the servants present were examined, and, so far as they could prove the negative, it is shown by them that they did not receive it. Whether, if it ever reached their

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custody or not, the defendant could be held responsible, it is unnecessary to inquire, as the evidence on the first point is so doubtful as to render the decision of the justice on that point conclusive.

Upon the second ground, also, I think the justice has not erred. The evidence does not show the defendant to be an inn-keeper. The mere name of his building, although called a hotel, does not establish that he is an innkeeper. If the business carried on by him was that of a boarding-house or restaurant merely, he would not thereby be subjected to the liabilities of an innkeeper. *Story on Bailments*, 475.

In order to warrant a finding against the defendant as an inn-keeper, the evidence should have established that the place kept by the defendant was an inn—a place provided for the lodging and entertainment of travelers. No such evidence was offered in this case, and the justice would have erred in holding, on the testimony before him, that the defendant was an innkeeper. I have laid out of view the fact that the loss occurred in the saloon, whither the plaintiff resorted, not as a traveler, but for the mere temporary purpose of obtaining a meal. It cannot now be held that restaurants are to be deemed inns, subjecting the keepers thereof to all the responsibilities of an innkeeper. On the contrary, as the customs of society change, and the modes of living are altered, the law, as established under different circumstances, must yield and be accommodated to such changes. A mere eating-house for meals cannot now be considered an inn, nor can the liabilities attaching to innkeepers be extended to the proprietors of such establishments. They are wanting in some of the requisites necessary to constitute them inns, as no lodging places are provided for travelers; and although the defendant may carry on in another part of his premises the business of an innkeeper, it does not follow that the liability for that part of his premises is to be extended to the whole.

There is also another difficulty in this case—as to the character in which the plaintiff went to the defendant's premises. To entitle him to the protection of his property, it should appear

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that he came to the defendant's premises as a traveler. If he went as a boarder, he cannot be deemed a traveler. Nor can a man who merely enters a restaurant to procure a meal, or refreshments (as the witness said), be deemed a guest.

Besides, even if the plaintiff could be deemed a guest, there is no doubt that his character as such had ceased before the article was stolen.

It is not pretended that the glass was stolen while the plaintiff was there. He had left the place without any intention of returning, and, if the property was stolen, it was after the relation of the parties as host and guest had terminated. In such cases the liability ceases with the relation.

Judgment affirmed.

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#### SERGEANT V. BAGLEY v. JOSEPH G. FREEMAN.

An assignee of a lease is liable to the original landlord, only in respect of his possession, and then only in case he is assignee of the whole term.

A general assignment for the benefit of creditors, which does not specifically mention the lease, does not, of itself, make the assignee liable for rent as assignee of the lease.

His entry upon and occupation of the demised premises are sufficient *prima facie* to charge him with the rent as assignee; but he may rebut the presumption arising from such occupation, and prove that he refused to take an assignment of the lease.

APPEAL by defendant from a judgment of the First District Court. This was an action to recover rent. In 1854, the plaintiff leased to one Andrew J. Powers the house No. 158 Third avenue, New York city, for five years. In May, 1854, Powers failed, and made a general assignment to the defendant for the benefit of his creditors. His lease was not specifically mentioned in this assignment. The defendant thereupon, as assignee, took possession of the demised premises, which he occupied for

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about three weeks. At the expiration of that time he sold the debtor's stock, &c., to one Andrew I. Gale, who took possession of the store, and remained there about five weeks longer, when the plaintiff retook possession of the premises. This action was brought to recover the rent for the two months during which the store was occupied by the defendant, and by Gale, who was placed in possession by the defendant.

On the trial, the defendant offered to show that the original tenant, Powers, offered him an assignment of the lease, which he refused to accept, but the evidence was objected to and excluded. Judgment having been rendered for the plaintiff, for the amount claimed, the defendant appealed.

*J. Aiken*, for the appellant, cited *Child v. Clark*, 3 Barb. Ch. R. 52; *Martin v. Black*, 9 Paige, 90; *Armstrong v. Wheeler*, 9 Cow. 90.

*Niles and Bagley*, for the respondent. If an executor or receiver enter into the possession of demised premises, or receives rent from an under tenant, he is himself liable for the rent to the original lessor. *Provost v. Calder*, 21 Wend. 517; *In the matter of Galloway*, 21 Wend. 32; and see *Martin v. Black*, 9 Paige, 641; *Thomas v. Pendleton*, 7 Taunt. 206; *Class v. Hume*, 1 Ryan & M. 207. So one who takes a conveyance of the whole term, or undivided part of any portion of the premises, is an assignee, and liable for a proportionate amount of the rent. *Child v. Clark*, 8 Barb. Ch. R. 52.

**BRADY, J.**—It was admitted on the trial, that in the assignment, which was general, "there was nothing specifically mentioning the lease" under which the plaintiff claimed rent from the defendant, as assignee. The defendant offered to prove, by the assignor, that he, the assignor, offered the lease, under the assignment, to the defendant, who refused to accept it. The plaintiff objected to the proof—the objection was sustained, and

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the defendant excepted. If the justice erred in rejecting the proof, then the judgment is erroneous, and must be reversed. The lease to the assignor, Powers, was for five years, from the 1st May, 1854; the occupancy of the defendant was for about three weeks, commencing about 20th May, 1854, and the rent reserved by the lease was payable quarterly.

An assignee is liable only in respect of his possession; he bears the burthen while he enjoys the benefit; but if the whole term of years is not passed over to him, if a day be reserved by the lessee, he is not liable to the landlord at all. He is an under tenant. *Taylor's Landlord & Tenant*, 218, and numerous cases cited. He must, therefore, be the assignee of the whole term. It is true that it is not requisite to charge him to show an actual entry on the land (*Walton v. Cronly*, 14 Wend. 63), where he accepts an interest under the lease, and the execution of a lease by the assignor, and possession by the assignee are sufficient *prima facie* to charge him as assignee, yet, he may prove that he is not an assignee. *Williams v. Woodward*, 2 Wend. 487. A lessor cannot maintain an action for arrears of rent against a party occupying premises charging him as assignee, when, in fact, he never had an assignment of the lease. *Quackenboss v. Clark*, 12 Wend. R. 555. Did the proof, in this case, show an assignment of the lease? It was admitted that the lease was not mentioned in the assignment, which left the question open to investigation, although the possession by the defendant was, as we have said, sufficient *prima facie*. He proposed to show that he was not the assignee of the lease, having refused to accept it under the assignment, and the justice erred in not admitting the proof. *Williams v. Woodward, supra*. The justice, by rejecting the testimony, assumed that the defendant was the assignee, notwithstanding the admission before him. There is nothing to support such an assumption, unless by construction of the assignment read in evidence, which is not before us. The defendant was not bound to accept the lease, because that would have imposed upon him a personal obligation distinct from his trust. His representative character could not affect

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the landlord's right to hold him by privity of estate, on all the covenants running with the land. If the fact offered to be shown was proved, the defendant would not be liable to the lessor. He was a tenant at sufferance of the lessee, and clearly not liable to any one else. There are other considerations why he should not, on such proof, be regarded as an assignee, which it is unnecessary to state. It appears, on authority, that the proof offered was relevant, and should have been admitted. The justice erred, therefore, and the judgment must be reversed.

Judgment reversed.

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WALTER K. MOORE and wife v. JOHN W. SOMERINDYKE.

Upon judgment being given for the defendant, in an action commenced by attachment in the Marine Court, he is entitled to an immediate return of all property taken from him by virtue of the attachment.

And his right to such return is in no way suspended or affected by the plaintiff appealing from the judgment.

In a subsequent action by the defendant in the attachment to recover from the officer the property taken by him under it, it is no defence that the property in question has not been paid for by the defendant thus claiming its return.

The admission of immaterial evidence at the trial forms no ground for a reversal of the judgment, when it can be seen that no harm resulted from its admission.

Objections stated on the argument of appeal cases, but not contained in the notice of appeal, will not be considered.

**APPEAL** by defendant from a judgment of the Marine Court. The facts in this case are sufficiently stated in the opinion of the court.

*Smith and Moody*, for the appellant.

*Townsend, Dyett and Raymond*, for the respondent.

**INGRAHAM, FIRST JUDGE.**—This action is brought to recover from the defendant goods taken by him from Walter K. Moore,

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by attachment issued in an action in the Marine Court, of *Dwight Bishop v. Walter K. Moore*. That action was tried, and judgment rendered for the defendant. From that judgment the plaintiff appealed, and the appeal is still pending.

The grounds of appeal in this case are, *first*, that the justice erred in allowing proof of the declarations of Walter K. Moore that he had given the property to the wife.

That such testimony was improper, I have no doubt. This was a conversation after the property had been given to the wife, if it was ever so given, and was nothing more than a mere admission of one of the plaintiffs as to what he deemed necessary to make out the case in her favor. But, although improper, it was in this case immaterial. Whether the property had been given to her by him or not, he had the right to its possession. It was not separate property, within the meaning of the statutes of 1848 and 1849. They expressly excluded property given by the husband to the wife, and left such property subject to the same liabilities as existed previous to their passage. The husband had at any time a right to the possession, and the property was subject to liability to his creditors for the payment of his debts.

The *second* objection is, that the testimony offered to show that the goods in question had not been paid for was improperly excluded. For the purposes of this suit it was immaterial. The action was not between the creditor and the purchaser. Their respective rights had been adjudicated in the action of *Bishop v. Moore*: and whether paid for or not, that fact could form no defence in an action against the officer to recover back from him property taken by him on attachment, in an action in which it had been decided that the plaintiff was not entitled to recover.

It is said that an appeal has been taken, which is undecided. That, however, is of no avail. The court below decided against the plaintiff in that action. If the judgment should be affirmed, the plaintiff then would have no claim. If it should be reversed, the attachment proceedings can be of no avail. The plaintiff would be compelled to commence a new action, to enforce his

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claim against Moore. There is no provision of law by which the goods levied on under that attachment could be held liable for the recovery in the new action.

There are difficulties attending this case, and, in its present form, if they had been made grounds of appeal, would have presented serious objections to the judgment. The wife should not have been made a plaintiff. The other plaintiff, being the party in possession when the goods were taken, had a right to bring the action, and was entitled to a return of the property, and the evidence is sufficient to sustain his title. The duty of the officer was to take the property, and keep the same to satisfy any judgment that might be recovered on the attachment. As soon as it was established that no judgment could be recovered thereon in favor of the plaintiff, the right to retain the goods ceased, and the defendant in the attachment was entitled, upon demand, to have them restored to his possession. Her name, however, can be stricken out as plaintiff, even after judgment.

It is unnecessary to notice the other objections stated by the appellant's counsel, as they are not stated as grounds of appeal by him in his notice.

Judgment affirmed.

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#### MOSES Y. BEACH v. JULIA RAYMOND and others.

Exceptions to the decision of the court or a referee, upon a trial before either, must be taken within ten days after notice of the entry of judgment, and the case or bill of exceptions made will not usually be resettled so as to allow exceptions to be inserted which were not taken within that time, and especially not if an argument upon the case or bill of exceptions has been had, and a decision rendered thereon. After the decision of an appeal, by the court in *banc*, the unsuccessful party cannot be allowed, for the purpose of an appeal to the Court of Appeals, to insert exceptions not appearing in the case, upon which the appeal in this court has been argued and decided.

APPEAL by defendant from an order at special term denying a motion for a resettlement of a bill of exceptions. The facts

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out of which the motion arose are very fully stated in the opinion of the court.

*Henry B. Cowles*, for the appellant.

*M. S. Brewster*, for the respondent.

BRADY, J.—This is an appeal from an order made by Judge Woodruff at special term, Dec. 5, 1855.

The action was tried before a referee, who reported for the plaintiff; and a case was made with leave to turn the same into a bill of exceptions or special verdict. An appeal was taken from the judgment entered on the report of the referee, and upon the case so made, to the general term of this court; and after the argument thereof, and before the court had given a decision thereon, and on the 23d of March, 1854, Raymond, one of the defendants, died. On the first of April following, the general term affirmed the judgment, and the judgment of affirmance was, by order of the court, entered as of a day during the lifetime of Raymond. On the 18th of June, 1855, on application of his administrators, an order was made reviving the action in their names, for the purposes of an appeal to the Court of Appeals, and on the same day a proposed bill of exceptions was served, on their behalf, on the plaintiff's attorney, containing exceptions in manuscript not appearing in the case as made and settled, and to which the plaintiff proposed an amendment striking out such manuscript exceptions, and which amendment was allowed. The defendants then moved for an order for the resettlement of the exceptions proposed, and of the amendments thereto proposed, and for an order that the amendment proposed to the bill of exceptions be disallowed, and the exceptions proposed be allowed. The order of the 5th of December above mentioned denied such motion.

The plaintiff insists that the order is not appealable under section 349 of the Code; but, if appealable, only so on the certificate of Judge Woodruff under the rule of this court (March 22,

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1851), which was not complied with, no certificate having been obtained. He also insists that the appeal is irregular, because the papers, on which the question submitted arises, were not served on him; and further, that the exceptions being new exceptions, and not having been taken within ten days after the notice in writing of the judgment originally entered, they are presented too late. Judge Woodruff has expressed his opinion in favor of the last stated objection to the exceptions (2 Abbott, 204), and there is no doubt that it is fatal. Sections 268 and 272, of the Code, limit the time within which exceptions may be served to ten days after notice of the judgment upon the trial, either by the court or by referees. The ten days had long expired when the exceptions were served, and the appeal had been heard and decided at a general term upon the whole case made and settled. The right to turn the case into a bill of exceptions is limited (Rule 18) to thirty days after notice of the decision on such case; but there is no rule or precedent allowing exceptions to be taken, or interposed, as if made on a trial, after an argument in *banc* on a case or bill of exceptions, in which they did not appear. The effect would be to present to the appellate court questions which were neither presented to nor considered by this court, and upon which there was no determination by this court. However that may be, the party who designs to avail himself of exceptions must take them in the manner and during the period allowed by the statute. If he does not, they are lost. The leave given to turn the case into a bill of exceptions, as stated by Judge Woodruff (2 Abbott, *supra*), "is not a leave to take exceptions in the future, but to convert the case (made for the purpose of reviewing the report of the referee, and which embraces his ruling upon the law as well as his finding on the facts) into a bill that shall exhibit the exceptions already taken, and which alone is suited to the purposes of an appeal to the court of last resort."

This view renders the consideration of the preliminary objections unnecessary.

Order appealed from affirmed.

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**WILLIAM BROWN v. WILLIAM B. JONES.**

The provisions of 2 Revised Statutes, 253, sec. 159—giving the party, in whose favor an execution is issued, an action of debt against the constable receiving it, who fails to return it within five days after the return day, and in which action it is provided that the recovery shall be the amount of the execution with interest—do not apply to process issued out of the Marine or justices' courts of the city of New York.

When a constable fails to return an execution issued out of the Marine Court, that court may compel its return by attachment, or the party in whose favor it is issued may bring an action against the constable for his neglect, and in which a recovery may be had to the extent of the damages proven to have been sustained by reason of the default of the officer.

The decisions of the Marine Court upon questions respecting its practice, and not affecting the merits of an action, are not the subject of review in this court.

Answering in bar to the action waives all matter which might be set up in abatement.

**APPEAL** by defendant from a judgment of the Marine Court. This was an action brought against the defendant, who is a constable of the city of New York, under the following provision of the Revised Statutes.

“If a constable neglect to return an execution within five days after the return day thereof, the party, in whose favor it was issued, may maintain an action of debt against such constable, and shall recover therein the amount of the execution, with interest, from the time of the rendition of the judgment upon which the same was issued.” 2 R. S. (4th ed.), p. 449, sec. 142; margin p. 253, sec. 159.

The summons was for a money demand on contract. The complaint averred that William Brown, the plaintiff, recovered a judgment against Peter Larkin and Edward Donaghan for \$269.39, and that an execution was issued thereon to the defendant as constable, which he had failed to return within five days from its return day, and demanded judgment for the amount of the original judgment under the statute cited above. On the return of the summons, the defendant moved to dismiss the com-

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plaint because of variation from the summons. The motion was denied.

Upon the trial the plaintiff produced the record of the judgment in favor of himself, and against Larkin and Donaghan, and the defendant admitted that he had received an execution thereon, which had not been returned. It was proved also that he had paid the plaintiff \$95 on the execution. The court rendered judgment for the amount of the original judgment and interest, deducting this payment, and the defendant appealed.

*H. V. Vultee*, for the appellant.

*Frederick Rice*, for the respondent.

INGRAHAM, FIRST JUDGE.—The objection to the summons is not one that can be made available in this court. That objection was made in the court below upon a motion to dismiss the summons, for a variance between it and complaint. That was a mere question of practice in that court, the decision of which is not a subject of review here. If the defendant wished to present the matter before this court on appeal, it could only be by setting it up in the answer in abatement of the suit.

Even if such had been done in the court below, the defendant waived his right to review it on appeal, by answering in bar. We have repeatedly so held, and it is now the settled practice of this court on appeal. 1 E. D. Smith Rep. 412, 615.

This action was to recover from the constable the amount of an execution delivered to him to be executed, on the ground that he neglected to return it within five days after the return day, under the provisions of the 159th section of title 4, chapter 2, part 3, of R. S. 2 R. S. 253.

These provisions of the Revised Statutes are not applicable to the courts in this city. By the 231st section of the same title, it is provided that this title shall not be considered as applicable to the courts in the city of New York. I know of no provision of law which at any time since has made them applicable, and the counsel for the plaintiff has not referred to any as furnishing

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any authority upon which such a ruling, as is necessary to sustain the judgment, can be upheld.

The provisions of law, relating to executions out of the Marine Court, may be found in the 99th section of the act to reduce the laws relating to the city of New York, &c. (2 R. L. [1813], p. 370), made applicable to the Marine Court by section 135 of the same act. These sections provide a penalty against the officer for not levying within five days after receiving the execution, or in fifteen days after levy, for not paying into the court the damages and costs so levied, to the amount of such execution. No provision is made in this statute of any penalty for not returning the execution as in the justice's court statute before referred to.

As the complaint in this case avers no other default, on the part of the defendant, than not returning the execution, and claims to recover only for the penalty imposed under the provisions of the Revised Statutes (which do not apply to the Marine Court), I do not see how the judgment can be sustained.

Even if we were to disregard the pleadings, we could not sustain the judgment upon the evidence. There is no proof of any default on the part of the officer, except for not returning the process. It does not appear that he did not levy, nor that he ever received any money which he ought to have paid over. Without proof of some default, such as the statute designates, the plaintiff could not recover. The plaintiff is not without remedy against an officer, in the Marine Court, for not returning an execution. That court may compel the return by attachment, under its present organization and powers; or the plaintiff may bring an action on the case for not returning the execution, but, in such a case, he does not recover the amount of the execution, but such damages as he has sustained in consequence of the default of the officer. *Buck v. Campbell*, 15 John. R. 456. Such damages must be proven, and where, as in this case, part of the amount was paid afterwards by the officer to the plaintiff, he could not claim, as damages, the whole amount of the judgment.

Judgment reversed.

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Hibbard v. Stewart.

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OLIVER HIBBARD and THOMAS MCCOY *v.* HUNTING M.  
STEWART.

Where a person stands by, and knowingly suffers another to claim to be the owner of personal property, and to make an agreement concerning it with a third person, he cannot afterwards assert his own title to such property, to the damage of the party deceived.

When property, unlawfully taken, is afterwards returned to the owner, before suit brought, and is accepted by him, the return and acceptance should be considered in mitigation of damages.

In such a case, judgment for the whole value of the property taken is erroneous.

THIS was an appeal from a judgment of the Marine Court.

The action was brought to recover damages for taking and carrying away two oil cloths, claimed to belong to the plaintiff, of the alleged value of sixty dollars.

On the trial, the plaintiffs had judgment for sixty dollars and costs, and defendant appealed. The facts are stated in the opinion of the court.

*A. L. Pinney*, for the appellant.

*Townsend, Dyett and Raymond*, for the respondents.

INGRAHAM, FIRST JUDGE.—Carr, being the owner of some property in a house on the Fourth avenue, gave to Clark & Allen a mortgage on certain portions of it. Clark & Allen foreclosed their mortgage, bought in the property, and leased the same to the plaintiffs, who took possession thereof. The defendant, having a judgment against Carr, levied upon and sold two of the oil cloths in the premises leased to the plaintiffs. After the levy, Clark agreed with the defendant that he should return the oil cloths, or such as he had not sold, and that the same were to be paid for by the losing party in an action brought by Clark & Allen against the defendant. The plaintiffs were

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present at this arrangement, and did not object to the same, but were parties to the agreement. Upon the trial, the defendant succeeded. This suit was then brought to recover for the same property.

Without expressing any opinion as to the right of the plaintiffs to recover for the property not returned, I think the plaintiffs were estopped by their own acts from claiming to recover for that portion which was returned under the agreement with Clark & Allen. They were present, and were parties to the arrangement by which the property was returned to the premises occupied by them, under the agreement made by their landlord. They never claimed any title to the same, nor objected to the arrangement; but their assent must be presumed from the facts in evidence.

*Thompson v. Blanchard* (4 Com. 303) and *Dexell v. Odell* (3 Hill, 215) sustain this doctrine. In the former case it is recognized as a correct principle, that when the owner of goods stands by, and allows another to treat them as his own, by which means a third person is induced to purchase them, the former cannot recover them from the purchaser. When any one by his conduct causes another to believe in the existence of a state of facts, or by his silence admits another to be the owner of property, when such ownership is asserted, so that a third person in acting upon it assumes responsibility, or parts with property, he cannot afterwards aver his own title to the injury of such person.

The application of this principle to the present case shows, that, as to the property returned to the house, the plaintiffs, by their silence when the arrangement was made between their landlord and the defendant for the return of the property, should be considered as assenting to such arrangement, and are estopped from subsequently recovering from the defendant for the same property.

The same principle is more broadly asserted in *Gregg v. Wells* (10 Ad. & E. 90), where it was said that, "A party who negligently stands by, and allows another to contract on the faith or understanding of a fact which he can contradict, cannot after-

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wards dispute that fact in an action against the person whom he has assisted in deceiving.

There is, also, another objection to sustaining this judgment, viz., that the recovery is for the whole value of the property, while the proof shows that part of the property was returned to the possession of the plaintiffs before suit brought. Although this would be no bar to the action, it should be used for the mitigation of damages; and a recovery for the whole value of the property taken was erroneous. *Hanner v. Wilsey*, 17 Wend. 91; *Vosburgh v. Welsh*, 11 J. R. 175; *Gibbs v. Chase*, 10 Mass. 128.

Judgment reversed.

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**SAMUEL ALLEN v. GEORGE SCARFF.**

S. went with D. to the store of C., requested him to sell goods to D., and said he would see that C. was paid for them. He at the same time requested C., privately, not to inform D. that he was security, but to try first and get the money from D., and, if D. failed to pay, he, S., would. In an action by C. against S. for goods sold, which were delivered and charged to D., who failed to pay for them—  
*Held*,

I. That the undertaking of S. was collateral, and, not being in writing, was void under the statute of frauds.

II. That the original undertaking being void, the testimony of C., that he sold the goods upon the credit of S., was irrelevant, and was improperly admitted on the trial.

III. That a subsequent promise by S., to pay for the goods, would not render him liable therefor.

The rule which controls in such cases is, that if the credit is not given wholly to the person who undertakes to be responsible for goods delivered to another, his undertaking is collateral, and must be in writing.

And where the original undertaking is collateral, and void under the statute, it cannot be made valid by the vendor's showing that he intended to give the credit to the person sought to be charged with the debt, nor by such person's subsequent parol promise to pay.

**APPEAL** by defendant from a judgment of the Marine Court. The action was brought by the plaintiff as assignee of one G. D.

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Clark, to recover for goods sold and delivered. The goods were delivered to one George Deagle. The question was, whether the undertaking of the defendant was collateral or not. The facts in the case are fully stated in the opinion of the court. The judgment in the Marine Court was for the plaintiff.

*C. Kesler Smith*, for the appellant.

*Townsend, Dyett and Raymond*, for the respondent.

BRADY, J.—The plaintiff sought to charge the defendant in the court below upon a promise given to G. D. Clark, the plaintiff's assignor, made under circumstances as follows:—Defendant went to the store of Clark accompanied by Deagle, whom he introduced to Clark, and said that Deagle and another person were about buying out his place at McComb's Dam, and requested Clark to sell liquors to Deagle, and he (defendant) would see that he (Clark) would get his pay. That afterwards, and during the same interview, defendant walked with Clark to the front of the store, and requested Clark not to say anything to Deagle about his being *security*; but to try first and get Deagle to pay, and provided he (Clark) failed so to do, he (the defendant) would pay him (Clark).

It seems, from the return, that a paper marked "C" was proved and admitted, the defendant excepting; but as that paper is not annexed to the return, we are unable to determine whether it was improperly admitted or not.

The plaintiff proved and offered in evidence a paper marked "B," which was also admitted (the defendant excepting), is annexed to the return, and is in these words:

"New York, April 9th, 1853.

"Received, from George Deagle, one dollar, the same being in full of all notes, bills, &c., which are due, or may become due on or before the 9th of December, 1853.

(Signed) "GEORGE SCARFF."

The plaintiff also proved, by the witness Clark, promises to

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pay the debt by the defendant subsequent to the introduction of Deagle, above stated.

The plaintiff also asked the witness Clark, by whom his case was proved, upon whose credit he sold the goods, which was objected to and admitted, the defendant excepting.

It appeared, on the cross-examination of Clark, that he *charged the goods to Deagle*, and sent him a bill, and sold to Deagle and Wanmaker goods subsequently, without payment of the claim in suit, and because Deagle had acted honorably in giving to the witness the paper "B" mentioned.

The examination of Clark being concluded, the defendant moved for a nonsuit upon the grounds—

1. That there was no proof of delivery.
2. That the contract of defendant was void under the statute, not being in writing.
3. That it appeared that the whole credit was not given to George Scarff, and that the undertaking of defendant was therefore collateral and void.

The motion was denied, and the defendant excepted.

The paper "B," it is insisted, created a promise to pay Clark. It is not susceptible of any such interpretation. It is a receipt to Deagle in full for all bills which might become due, &c., and must be construed to mean, due to the defendant, by whom it was signed. Such is its plain and obvious import. It does not contain any words of obligation, or of promise to do anything, or to omit to do anything, and cannot be regarded otherwise than as a discharge of debts to become due to the defendant from Deagle. It was, therefore, irrelevant, and should have been excluded.

The question as to whom the credit was given was improperly admitted. That feature in the transaction was to be determined by the acts of the witness in regard to the sale, and a consideration of the attending circumstances at the time the promise was made, provided there was any doubt on that subject, and the promise was sufficient in law; but wholly immaterial if the *promise itself was void*. No act of the vendor could then create

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a liability of the promisor not legally arising from his promise. The validity of the judgment does not, however, depend on that question. It rests upon the character of the undertaking, which will be presently considered. No other exception was taken prior to the motion for nonsuit, and no other questions to be reviewed were presented.

The rule which controls in these cases is, that if the credit is not given *wholly* to the person who undertakes to be responsible for goods delivered to another, his undertaking is collateral, and must be in writing. *Dixon v. Frazee*, 1 E. D. Smith, 35; *Cahill v. Bigel w*, 18 Pick. 369; *Cram v. Carville*, 5 Hill, 483; *Brady v. Sackrider*, 1 Sandf. R. 514; *Comyn on Con.* (ed. 1835) 236; *Leonard v. Vredenburgh*, 8 Johns. 29; *Story on Con.* (3d ed.) p. 953; *Smith's Mercantile Law*, 456. The promise, "I will see you paid," is said by *Story* to be sufficient to create the original liability necessary to bind the promisor; but in *Matson et al. v. Wharam* (2 T. R. 80), such a promise was held to be collateral. In that case the goods were charged to the person to whom they were delivered, and the defendant refused to pay. It is, in all its essential features, in point in this case, as to the first part of the defendant's alleged undertaking. Perhaps, if the engagement of the defendant was to see the vendor paid, it might be held sufficient, but in this case something more occurred. The defendant took the vendor aside after he had promised to see the bill paid, and it was then agreed that the vendor should try to get his debt from Deagle first, and if he failed, then the defendant was to pay. The whole agreement is to be considered, and the last undertaking accepted must control. That was a conditional one, and as such was collateral and void. The whole credit was not to be given to the defendant. The vendor was to try and get the debt from Deagle, and, if unsuccessful, was to be paid by the defendant. It amounted to this, "I will pay you, if Deagle will not," which would be within the statute of frauds (*Comyn on Con.* 234; *Story on Con.* p. 954); or, "If Deagle does not pay you, I will," which would be equally so. Whether, therefore, the vendor said he gave the credit to the defendant or

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not, would not aid the plaintiff's case. The undertaking was one which could not bind him, either by the vendor's giving him credit or by a subsequent promise to perform it. It was void, and the subsequent promise was without consideration, not in writing, and void also. It was a promise to pay a subsisting debt, and not to discharge a previously existing liability. It is by no means clear, on Clark's own showing, that he gave the credit to defendant. He charged the goods to Deagle, and that is strong, though not conclusive, evidence that he regarded defendant as surety. *Keate v. Temple*, 1 B. & P. 158; *Croft v. Smalwood*, 1 Esp. 121; Smith's Mercantile Law, 456.

The nonsuit was improperly denied and the judgment was erroneous.

It is insisted that the finding of the justice is conclusive, the testimony being contradictory, and such is undoubtedly the rule in cases to which the rule is applicable. If the promise made by the defendant was sufficient to charge him primarily, and the testimony conflicting as to *what he said* or *what his promise was*, then the finding would be conclusive. But here, conceding the promise or undertaking as made, it was collateral, and the only fact the justice could properly find was, that such collateral engagement had been made.

Judgment reversed.

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BAPTISTE DE BENEDETTI v. HERMAN MAUCHIN and others.

As a general rule, the admission of one defendant in tort is not admissible against his co-defendants, where the action is for the negligence of one of the defendants; *e. g.*, against master and servant for the negligence of the servant.

But such admission is competent against the defendant making it; and it may be proven if a part of *res gestae*.

And where the subject matter of the admission is afterwards clearly proved by independent testimony, the judgment will not be reversed, because proof of the admission was received.

Where, in an action for personal injuries, which incapacitated plaintiff from pursu-

## De Benedetti v. Mauchin.

ing his business, a witness for plaintiff was asked what amounts other persons in the same employment usually earned, and he named several sums, adding that the plaintiff earned the same amount. *Held*, that the evidence of the earnings of other persons, though improper, could not have done harm, there being positive testimony to the individual earnings of plaintiff.

In an action for injuries occurring through negligence, the burden of proof is on the defendant to show that the plaintiff was himself guilty of such neglect as would prevent his recovery, by reason of his contributing to the injury complained of. In an action brought against a master and servant, to recover for injuries caused by the negligent act of the servant while engaged in the master's business. *Held*, that a refusal of the justice, to charge that the plaintiff must show that the accident was occasioned by the negligence of the servant, was erroneous.

**APPEAL** from a judgment of the Marine Court. This action was brought to recover damages for injuries sustained by plaintiff through the alleged negligent driving of a cart by defendant's servant. The facts were, substantially, that the plaintiff was an organ grinder; and on the 30th of March, 1855, was crossing the street, Park row, carrying his organ on his back, at a moment when the cart in question was coming down the street, from Center street. The cart and horses were owned by the defendants, Boscher and Middendorf, and were driven by the defendant, Mauchin, who was in their employ. The plaintiff was run over by the cart, his ribs were fractured, and his organ also was considerably damaged.

On the trial, the first witness called for the plaintiff was a police officer, one Cushing, who arrived at the spot almost immediately after the accident happened. He testified that on arriving he found plaintiff lying on the sidewalk, and Mauchin standing on a cart. He spoke to Mauchin about the accident, and Mauchin replied that "he could not help it, he could not avoid running over him." The counsel for Mauchin's employers, Boscher and Middendorf, objected to the reception of this evidence against them, but the objection was overruled. The circumstances of the accident were afterwards described by persons who were eye-witnesses of it, and were called on behalf of plaintiff. They testified to many details, which were relied on by plaintiff, as showing negligence on the part of the driver.

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A witness called for the plaintiff, on the question of damages, was asked "what organ grinders could earn." Defendants' counsel objected, but the justice allowed the question. The witness replied "that they could earn ten or twelve shillings, sometimes two dollars per day; that plaintiff earned that amount."

The plaintiff having rested, defendants moved for a dismissal of the complaint, on the grounds: 1. That plaintiff had not shown himself to be free from negligence. 2. That no negligence had been shown on defendants' part. This motion was denied.

After the evidence on both sides was closed, the defendants requested the justice to charge the jury, among other things, "that plaintiff must show that the accident was caused by the negligence of the defendant, Mauchin." This the justice refused.

The jury found a verdict in favor of plaintiff for \$250. Judgment having been rendered for that amount, the defendants appealed.

*Benjamin T. Kissam*, for the appellants.

I. In actions of tort, the admission of one defendant cannot be used against the other defendants; and the testimony of Cushing, as to what Mauchin said to him after the occurrence, should have been received as evidence against Mauchin only. 1 Phillips Ev. (3d ed.), 378; *Daniels v. Potter*, 4 Carr. & P. 375.

II. The plaintiff cannot recover what other persons might earn. This would be no basis on which to calculate the plaintiff's earnings. One man is more industrious than another; one may possess a better instrument. It was error, therefore, to admit evidence of the earnings of other organ grinders.

III. The motion for a dismissal of the complaint should have been granted. *Haring v. The New York and Erie Railroad Company*, 13 Barb. 9.

IV. The justice should have instructed the jury as requested by the defendants' counsel. *Spencer v. The Utica and Saratoga*

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*Railroad Company*, 5 Barb. 337; *Brand v. The Troy and Saratoga Railroad Company*, 8 id. 382; *Haring v. The New York and Erie Railroad Company*, 13 id. 9; *Barner v. Cole*, 21 Wend. 188.

*Henry H. Morange*, for the respondent.

I. The testimony of Cushing as to what Mauchin said was admissible as against all the defendants. Mauchin was in the employ, and driving the horses and wagon of Boscher and Middendorf, the other defendants, at the time of the commission of the acts complained of. He was their agent. The injury was, moreover, occasioned by the negligence and want of skill of the servant; and a joint action lies, therefore, against the masters and servant. They are all guilty of the same negligence at the same time, and under the same circumstances; the servant, in fact, and the masters constructively by the servant, their agent. In this view of the case also, the testimony was admissible. 19 Wend. 343. Again, the admission was made at the time of the commission of the wrongful act, and was on that ground competent. 1 Phillips Ev. 94.

II. The testimony, as to the earnings per day of organ grinders generally, was competent. The statement of the witness, on this point, might properly be taken into consideration, after proof of the time during which plaintiff was actually confined to his room, in estimating the damages.

III. The motion for a dismissal of the complaint was properly denied. Negligence is a mixed question of law and fact, and must be submitted to the jury. 14 Johns. 304.

IV. The judge's charge, given prior to the request made by defendant, embraced all that was necessary to be stated of the law governing the case. There was ample evidence of gross, if not wilful negligence on the part of Mauchin.

INGRAHAM, FIRST JUDGE.—Upon the trial of this action in the court below, the declaration of one of the defendants who was driving the cart, by which the plaintiff was injured, was admitted in evidence. The other defendants objected to it as not being admissible against them.

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That admissions made by one tort feasor are not evidence against others joined in the same action, where the cause of action is the negligence of one or more of the parties; is settled by repeated decisions. See 2 Cowen & Hill's Notes, 165, and cases there cited. But for several reasons this evidence could not have been excluded.

- 1st. It was admissible against the defendant making it.
- 2d. It was rather a part of the *res gestae* than an admission made subsequently, and as such was properly received.
- 3d. It was rather an excuse for the act, so far as the party was concerned, and not evidence to charge others.

And even if the testimony was subject to the objection, it became immaterial, because the whole transaction was proven by an eye-witness. The fact of the injury, and the mode of it was, it appears, proven by other testimony, which was not subject to any objection.

The evidence, as to what sums other organ grinders might earn, was not proper to prove the value of plaintiff's labors, but it could do no harm, because the same witness added that the plaintiff earned the same amount.

There would have been no propriety in the court granting the motion to dismiss the complaint. It was not incumbent on the plaintiff to prove that he did not commit any act of negligence on his part. If none appears in the evidence, the presumption is in his favor, and the defendant must show such negligence to relieve himself from the consequence of his negligent acts.

As the plaintiff's case was submitted, there was no such proof of negligence on the part of the plaintiff, and the conduct of the defendant, who was driving, was such as to warrant the inference that there was negligence on his part.

But the court erred in refusing to charge the jury as requested at the 2d request in the return, viz.: that plaintiff must show that the accident was occasioned by the negligence of the defendant, Mauchin. The whole theory of this action, by which the other defendants were sought to be charged for Mauchin's acts is, that they employed a servant who, while in their em-

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ploy, was guilty of so much negligence as to do injury to the plaintiff. Unless the jury found that the injury was produced by such negligence, a judgment could not properly be rendered against them. And even Mauchin, who was driving, was not responsible if his conduct was not wilful or negligent. The justice should have charged upon this point as requested, and his refusal to do so took from the jury the only question in the case on which there was any doubt.

Judgment reversed.

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ETIENNE GIBERTON v. LOUIS GINOCHIO.

The execution of an instrument, not under seal, may be proved by the admission of the party, although the instrument is attested by a subscribing witness who is not called, or his absence excused.

After the trial of an action in the Marine Court has commenced, the justice has no power to order an adjournment, except upon the consent of both parties, or for the reason that there is not time to conclude the trial at one session.

APPEAL from a judgment of a justice of the Marine Court. This action was brought upon an agreement in writing to deliver wines, segars and merchandise. The instrument was unsealed, and was as follows:

I hereby agree, and have agreed, for value received, and on demand, to deliver to Pierre Saracco, or order, wine, segars and merchandise to the value of one hundred dollars.

New York, Feb. 24, 1852.

L. GINOCHIO.

In presence of

JOHN R. MONAGHAN.

(Endorsed.)

Pay to the order of E. Giberton, for value received. New York, March 25, 1852.

P. SARACCO.

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Pay to the bearer, New York, July 28, 1855.

E. GIBERTON.

The cause came on for trial on October 16, 1855. A witness for the defendant being absent, it was consented in open court, by the attorneys for both parties, to proceed in part with the case, and that the trial should then be adjourned, and the deposition of the absent witness be taken and used as evidence in the cause; the deposition to be taken at the court-room, and the witness to be subpoenaed to appear for examination.

The trial then proceeded. The plaintiff did not call the subscribing witness to the instrument in suit, to prove its execution, nor did he offer any explanation of the absence of the witness. To prove the execution, he first called a witness who testified that he was acquainted with the handwriting of the defendant. On being shown the instrument, he said that "he did not think" the signature was in defendant's handwriting. The plaintiff then called a second witness, who testified that he called on defendant, produced the paper to him, and demanded the goods; that defendant admitted that he signed the paper, and delivered it to Saracco, but refused to deliver the goods. The defendant objected to the sufficiency of this proof, on the ground that the subscribing witness must be called, or his absence explained; but the objection was overruled.

Other evidence being introduced, the trial was adjourned by consent, pursuant to the stipulation above mentioned, until October 18th.

On that day, defendant appeared with his counsel, and presented an affidavit that the witness in question had been duly subpoenaed, and his fees paid. The witness not being present, the case was adjourned to the 20th, and an order to show cause why the witness should not be attached was granted. On the 20th the case was called, and an application was made on behalf of defendant for a further adjournment, on the ground of defendant's counsel being engaged in arguing a cause in the Superior Court, and on the ground of the absence of the witness.

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Diligence had been used to serve him with the order, but he had not been found. These facts were shown by affidavits. The application for an adjournment was refused, and judgment rendered for the plaintiff, from which defendant appealed.

*L. E. Bulkeley*, for the appellant.

*Frederick Rice*, for the respondent.

INGRAHAM, FIRST JUDGE.—The justice did not err in admitting proof of the confession of the defendant to the making of the note in controversy. Although the rule as to sealed instruments requires the production of the subscribing witness, yet, as to instruments not under seal, the strictness of that rule has been so far relaxed, in this state, as to permit the instrument to be proven by the confession of the party signing it. *Hall v. Phelps*, 2 John. R. 451; *Shaver v. Ehle*, 16 id. 201; *Manri v. Heffernan*, 13 id. 75; *Henry v. Bishop*, 2 Wend. 575.

The evidence in this case was the direct admission of the defendant, that he had signed the instrument in suit, and delivered it to Saracco.

The contradiction between the two witnesses, as to the signature, was not fatal to plaintiff's case. The first witness only stated his opinion. It left a question for the justice to decide, with which we do not interfere.

There was no error in refusing the adjournment. There had been one adjournment in pursuance of the stipulation, and we have held that the justice has no power to adjourn after commencing a trial, without the consent of both parties, if he has time to conclude the case without it.

Judgment affirmed.

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Allen v. Bates.

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**HUGH ALLEN and others v. JOHN W. BATES and others.**

A carrier who receives grain for transportation, the freight upon which is to be paid by the bushel, can only recover freight for the quantity actually delivered by him.

**APPEAL** by defendants from a judgment of the Marine Court. This was an action to recover for freight for the transportation of a quantity of corn from Buffalo to New York. The charge was at the rate of twelve and a half cents per bushel. The corn was brought down, one lot on the canal boat Times, and one lot on the canal boat Red Gauntlet. The plaintiff claimed for carrying 4,000 bushels on each boat. He also claimed two items of \$20 each for lighterage, and \$20 for two days' demurrage, making the entire charge \$1,060. The defendants had paid \$950, leaving a balance of \$110, claimed to be due.

The evidence showed that the corn was loaded at Buffalo by weight, and that, allowing fifty-six pounds to the bushel, 4,000 bushels were loaded on each boat. But upon its delivery in New York the corn was measured again, and it was then discovered that there were on one boat only 3,937 bushels, and on the other 3,969 bushels, leaving a deficiency of ninety-four bushels in all. The defendants refused to pay the claim for lighterage and demurrage. They also claimed to recover damages for the deficiency in the corn, which they claimed to set off against the plaintiff's charge for freight, and declined to pay freight except for the number of bushels actually delivered.

Upon the trial, the plaintiffs offered evidence, without objection, that it was not customary for forwarders, in settling freight bills, to pay for a deficiency in grain if it fell short. Evidence also was offered of a promise made by the defendants to pay the plaintiffs' claim, upon their deducting \$20 damages. But it appeared that this offer was made in the course of a proposition pending for a compromise between the parties. Judgment was rendered for the plaintiff in the Marine Court for \$93.60. The defendants appealed.

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Allen v. Bates.

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*William Bruerton and C. Van Santvoord, for the appellants.*

*Calvin Noyes, for the respondents.*

INGRAHAM, FIRST JUDGE.—In this case it is proven that the corn was loaded on board of both the boats by weight, and, allowing fifty-six pounds to the bushel, that 4,000 bushels were put on board of each boat. It is also proven, that in delivering the cargo here it was weighed, and that the amount delivered, allowing the same weight for a bushel, was, on board of one boat, 3,937 bushels, and on the other 3,969 bushels—making a deficiency of ninety-four bushels from the amount placed on board at Buffalo. For this deficiency no explanation is given, and no excuse shown. The receipts for the corn also state the amount on each vessel to be 4,000 bushels at twelve and a half cents freight per bushel.

I can find no evidence in the case warranting a charge against the defendants for the corn not delivered. If the whole amount was *not* put on board the vessel, the plaintiffs can only recover freight on as much as was received and delivered.

If the whole *was* put on board, they have not, according to the evidence, delivered to the consignee as much as they have received. In either view of the case, the plaintiffs can only recover freight on the amount actually transported and delivered to the consignee.

The evidence received by the justice, of a promise to pay the bill, if it had been objected to, should have been excluded by the court. It was an offer to compromise the claim, and was not proper to bind the defendants if the offer was not accepted. It was, however, received by the court, and although not sufficient to make the defendants liable for freight on the portion which was not delivered to them, still, with the evidence of a custom in the trade not to pay for deficiencies, which was admitted without objection, was, I think, sufficient to warrant the court below in not charging the plaintiffs with the value of such deficiency. Even if the court had allowed the defendants for the

## Krender v. Woolcott.

amount of corn not delivered, no value is shown, and the court could not, with propriety, have made any deduction on that account.

The case appears to have been tried partly on admissions made before the court, which do not appear in the return (such as the supposed allowance for damage), and without the proof or admissions before us we have no sufficient data upon which any allowance could be predicated.

There must be deducted from the judgment the freight on ninety-four bushels not delivered, at twelve and a half cents per bushel, amounting to \$11.75.

We think, also, the charge of lighterage, \$20, was also improperly allowed. There was no evidence to show that this charge had been incurred. The sum of \$31.75 must be deducted from the judgment, and the judgment affirmed for the residue, with costs of the court below.

Judgment accordingly.

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LOUIS KRENDER v. HENRY H. WOOLCOTT and others.

An agreement to forward goods, marked for a particular destination, is discharged by shipping them, by the usual or most direct conveyance, to the place designated.(a)

But it is otherwise on an agreement to forward them to the place of their destination, the charge for freight for the whole distance being fixed and specified in the agreement. In such case, the parties making it are liable as common carriers for the safe carriage and final delivery of the goods at the place of their final destination, although it is at a point beyond the usual terminus of the carrier's route.(b)

A common carrier, having received goods for transportation and given a bill of lading therefor, specifying the name of the consignee to whom the goods are to be delivered, is responsible for the safe delivery of the goods, and, if necessary for that purpose, is bound to see that they are properly marked.

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(a) Compare *Joseph J. Dillon v. The N. Y. & Erie R. R. Co.*, post, p. 231.

(b) But see *Franklin W. Hunt v. The N. Y. & Erie R. R. Co.*, post, p. 228.

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**APPEAL** by defendants from a judgment of the Marine Court. This action was brought against the defendants as common carriers, to recover for the loss of twenty-three boxes of Hock wine. The defendants constitute the Union Transportation Company; they received the goods in question at New York, to transport to St. Louis, Mo., and gave the following bill of lading for them:

1853.

Union Transportation Co. By Erie Canal.

Mark Packages U. T. Co., and ship by Swiftsure Towboats, foot of Broad street.

*Proprietors.*

H. H. Woolcott & Co., N. York.      B. A. Root & Co., Albany.  
Davis & Sutton, Buffalo.      A. G. Morgan, Buffalo.

H. H. Woolcott & Co.,      }      Apply to  
Tim. O'Connell,      } 113 Broad st., New York (lower floor).

Contents of Packages un-  
known.

"C. W. L."  
for Metzer & Lange,  
St. Louis, Mo.  
Care Gilbert Knapp, Jr.,  
St. Louis.

New York, Sept. 7th, 1853.  
Received from Messrs. W. & B.  
Lange the following packages  
(contents unknown), in apparent  
good order, viz.: twenty-three  
boxes m'dse, No. 44 to 63 and 65  
to 67. Freight 1.00 per 100 lbs.,  
subject to rise in Ill. river. Frt.  
over 15c. per 100 lbs.

Marked and numbered as per margin, which we agree to forward from New York to St. Louis. Said Union Transportation Company shall not be held accountable for the dangers of the seas, lakes, rivers, fire, breakage of looking-glasses or marble, leakage of oil or other liquids, or loss of nuts or shot, if shipped in bags; nor for any damage or deficiency in packages of goods, if received at St. Louis in good order. Should a loss of any of said goods occur upon the lakes or rivers connected therewith, the charges to and at Buffalo shall be paid by the owner of said

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goods, and any insurance effected upon said goods, for the benefit of the owner or shipper, shall be also for the benefit of said Union Transportation Company.

(Signed)                    T. O'CONNELL, Agent.

The goods thus received for were never delivered in St. Louis to the consignees there. The reasons of the defendants' failure to make such a delivery are fully stated in the opinion of the court. The defendants claimed, under this bill of lading, to be liable only as forwarders. Judgment was rendered against them in the Marine Court, and from that judgment they appealed.

*J. N. Balestier*, for the appellants.

*F. A. Stallknecht and St. Clair Smith*, for the respondent.

**DALY, J.**—The firm of W. & B. Lange imported twenty-three cases of wine. They were taken from the vessel in which they arrived from Europe, and were put on board one of the towboats of the Swiftsure Line. When the cases were delivered on board the towboat, an order upon the inspector of the vessel in which they were imported, in these words :

“Sir—You will please send No. 44, one case, to W. B. Lange, ‘C. W. L.’ pier 1 N. R., No. 44 to 63, 65 to 67, twenty-three cases, to the Swiftsure towboat, foot of Broad street, and hand the receipt to

W. & B. LANGE:

was handed to the receiving clerk of the Swiftsure Line, and he endorsed upon it,

“Rec'd, on barge M. Barnes, 23 boxes, Sept. 1, '55. BOYD.”

Emilie Lange, of the firm of W. & B. Lange, of St. Louis, Mo., then went to the office of the defendants, who are the agents of the Union Transportation Line, and shipped the wine from New York to St. Louis. The defendants signed a bill of lading, by which they agreed to forward the twenty-three boxes to St. Louis for a certain sum or charge for freight, which was speci

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fied. E. Lange asked them who was their agent in St. Louis; and they told him it was Gilbert Knapp, Jr. When the bill of lading was made out by the defendants, it may fairly be presumed that the order and receipt above set forth were produced to them, as the receiving clerk of the Swiftsure Line testified that the bill of lading is usually made from the cart receipt. The bill of lading is for "twenty-three boxes m'dse, No. 44 to 63 and 65 to 67." E. Lange testified that some one in the office put the name of Knapp on the bill, and in the margin of the bill is the following entry: "C. W. L. For Metzer & Lange, St. Louis, Mo. Care Gilbert Knapp, Jr., St. Louis." It is insisted, on the part of the appellants, that the cases were marked ~~W.~~ C. L., and that the entry C. W. L. on the bill of lading was erroneous; but there is nothing in the evidence to warrant such an assumption. The bill in this respect corresponded with the cart receipt, and from the receipt endorsed by Boyd, the receiving clerk of the Swiftsure Line, on the order handed to him, the mark in which was C. W. L., and not W. C. L., and his statement on the trial that he supposed the twenty-three boxes were those alluded to in the order over his receipt, and that it is always considered that the goods shall be marked according to receipts by the shippers, it will be inferred, whatever the fact may have been, that the boxes were marked as in the cart receipt. It will be presumed, in the absence of any other evidence of what mark was on the boxes, that Boyd would not have endorsed his receipt upon an order containing the mark C. W. L., if the boxes were marked differently. It, moreover, appeared that the bill of lading from Lasalle, Illinois, to St. Louis, described them as marked C. W. L.

The cases were shipped on the 7th Sept., 1853, and in the same fall they were received and shipped by Geo. M. Howe, of Lasalle, Illinois, on board the steamer Excel, plying on the Illinois river, and were brought by that boat to St. Louis. As the captain of the boat could not ascertain by whom they were shipped from New York, nor to whom they were shipped in St. Louis, for the only mark upon them was three letters, he

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placed them on storage with an auction firm in St. Louis. He made diligent efforts to find the consignees, but without success, and then had them advertised for one month, in a newspaper published in English in St. Louis; after which he advertised them for another month, in a newspaper published in German, in the same place; and, no one appearing to claim them, they were sold at public auction, to pay freight and charges.

W. & B. Lange sent the bill of lading received by them to E. Lange, of the firm of Lange & Metzer, in St. Louis, and E. Lange called several times on Gilbert Knapp, Jr., in St. Louis, but could learn nothing of the goods. On the 31st of December, 1853, Knapp's clerk gave him a memorandum to the effect that the boxes had arrived, and Lange transmitted it to W. & B. Lange, the consignors. After Lange had called upon him, Knapp made inquiries in relation to the cases, and ascertained that they had been sold, and the proceeds, after deducting the charges of the auctioneer, had been paid to the owner of the steamer that brought them to St. Louis. The plaintiff is the assignee of W. & B. Lange.

Upon this state of facts, there can be no doubt of the plaintiff's right to recover. The agreement in the bill of lading to forward the goods from New York to St. Louis, and the specification in the bill of the amount of freight for the whole distance, show that the defendants undertook, as common carriers, to deliver the goods in St. Louis. *Wilcox v. Parmelee*, 3 Sand. S. C. 610; *Weed v. The Saratoga and Schenectady Railroad Co.*, 19 Wend. 534; *Harl v. The Rensselaer and Saratoga Railroad Co.*, 4 Seld. 37. The defendants were not forwarders, but carriers. 2 Kernan, 343. A simple engagement to forward goods at New York, marked for a particular destination, is discharged by shipping the goods, by the usual or most direct conveyance, to the place designated; but an agreement to forward them from New York to the place of destination, the charge for freight for the whole distance being specified in the agreement, is very different. It is an agreement to carry them for that distance, or to be

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responsible for their safe carriage and delivery at the place designated in the agreement.

The defendants told the shippers that Gilbert Knapp, Jr., was their agent at St. Louis, and from their own testimony it appeared that they were in the habit of consigning freight to him. By putting his name in the bill of lading, they made him the intermediate consignee at St. Louis, and they told E. Lange to call upon him at St. Louis to learn about the goods. Lange did so, and did all that was incumbent upon the shippers to do. It was the duty of the defendants to see that the goods were duly delivered to Knapp at St. Louis, or at least to have advised him in time, that the goods were shipped to his care. If they had so advised him, it may fairly be presumed that the goods would not have been sold for the payment of charges. They engaged to carry the goods as they were marked. The initials C. W. L., in the margin of the bill of lading, are placed between quotation marks, sufficiently indicating the mark upon the goods, and that the defendants knew they were not marked to Lange & Metzer, or to the care of G. Knapp, Jr. If the defendants were not satisfied to carry them thus marked, they should have said so. They therefore engaged to carry the cases, marked as they were, and deliver them to Knapp, at St. Louis; and, having failed to do so, are liable for the value of the goods.

Judgment affirmed.

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**FRANKLIN W. HUNT v. THE NEW YORK AND ERIE RAILROAD COMPANY.**

The liability of a common carrier, for injuries to goods, is limited to such injuries as are sustained while the goods are in his possession. He is not liable for injuries occurring after they have passed to the custody of others, beyond the route for which he is by law permitted to transport them, nor for such as occurred before they came into his possession.

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When goods are delivered to a carrier for transportation beyond the terminus of his line, and they are there delivered to another carrier to be forwarded, the latter is not liable for any damage to the goods, except upon proof that the injury occurred while they were in his custody. And it makes no difference that he received freight as agent for the other lines in addition to his own charges for transportation. (a)

APPEAL by plaintiff from a judgment of the Marine Court. This was an action against the defendants as common carriers, to recover damages for injuries to the goods of the plaintiff. The goods were delivered to the Northern Indiana Railroad Company, to be carried to Bergen, New Jersey. They were forwarded, after leaving that road, by the road of the defendants, who collected, on delivery, the freight for the entire transportation. On being opened, the goods were found injured by water, and this action was brought against the defendants to recover damages for the injuries. There was no proof that the injury occurred while the goods were in the defendants' possession. The complaint was dismissed, and the plaintiff appealed.

*Niles and Bagley*, for the appellant, cited *Bostwick v. Champion*, 11 Wend. R. 571; *S. C. Aff'd.* 18 Wend. 175; *Weed v. Saratoga and Schenectady Railroad Co.*, 19 Wend. 534; *Bowman v. Seull*, 23 Wend. 306.

*Eaton and Davis*, for the respondents. The termini of the New York and Erie Railroad are known and certain, and beyond them, after delivering the goods entrusted to it, to a forwarding line in the usual and customary manner, the company, *as matter of law*, is not liable for any loss or damage thereafter occurring to them. *Van Santvoord v. St. John*, 6 Hill, 151; *Farmers' and Merchants' Bank v. Champlain Transportation Company*, 23 Vt. 186, 209; *Nutting v. Conn. River Railroad Co.* 1 Gray (Mass.), 502; *Garside v. Trent and Mersey Trans. Co.* 4 T. R. 581; *Ackley v. Kellogg*, 8 Cow. 223; 1 Parsons on Con. 636, note *j*, 687, note *k*. And of course the converse is true, that it is not liable for loss

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(a) Compare *Louis Kriener v. Henry H. Woolcott and others*, *ante*, p. 223.

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or damage occurring to the goods before they come into the company's possession.

**INGRAHAM, FIRST JUDGE.**—On the 5th of April, 1854, the plaintiff delivered to the Northern Indiana Railroad Company certain property, to be forwarded to Bergen, N. J. On the 3d of May the goods were received at the depot of the Erie Railroad Company, and on the 10th of May were delivered by the company to the plaintiff, he at the time paying the defendants for transportation on their own road as well as the charges for transportation on the other roads. The goods were injured by wet, but no proof was given to show where the injury took place, nor at what time. The evidence only showed, by the opinion of a witness, that the injury had happened at least a fortnight previous to the delivery of the goods to the plaintiff. The justice dismissed the complaint.

The evidence was insufficient to fix any liability upon the defendants. They had made no contract of transportation with the plaintiff, and as carriers they were only liable for damage done to the goods while in their custody. There is no principle of law by which the defendants would be held liable for the negligence of other carriers who had previously been in charge of the plaintiff's goods. It is not shown that any such damage happened while the goods were in the defendants' possession; on the contrary, the evidence shows that from the appearance of the goods the injury had occurred at least a fortnight previous, and the fair presumption is, that it had happened before the defendants received them; besides, the plaintiff's admission is proven, that in his opinion the damage had not taken place while the goods were in the charge of the defendants.

It is not necessary, for the decision of this case, to inquire into the extent of liability of the company with which the contract was made. If either of the carriers is liable for the whole route, it could only be the one who made the original contract for transportation. Those who subsequently received and forwarded the goods can only be liable for damage done by themselves,

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and not before the goods came to their custody. This point was discussed in *Van Santvoord et al. v. St. John*, 6 Hill, 157; *Mallory v. Burritt*, 1 E. D. Smith, 234, and *Erne v. The New York and Erie Railroad Co.*, New York Com. Pleas, Gen. Term, June, 1855, in all of which the liability of the carrier was limited to injuries sustained while the goods were in his possession, and not after they had passed to the custody of others, beyond the route for which the carrier was by law authorized to transport them.

It is said the defendants received the freight for the whole distance, and therefore are responsible; but it is apparent from the receipt that they received such freight only as agent for the other lines, while the charge for their own freight is separate and distinct from the other charges.

A recovery is asked for also against the defendants because the goods were not delivered at Bergen, but were brought to Jersey City. The only charge of the defendants for freight appears to be from Bergen to Jersey City, where the goods were delivered to the plaintiff, and where the freight from Bergen to Jersey City was paid by him. It may well be presumed that he assented to such change of destination, from his paying the freight there; and, at any rate, before the defendants could be made liable for not delivering at Bergen, it ought to appear that they had received the property previously to be delivered at that place. Even if such fact had been proven, no damage is proven for the error, and in such a case the damages recovered would be only nominal.

Judgment affirmed.

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JOSEPH J. DILLON v. THE NEW YORK AND ERIE RAILROAD COMPANY.

The New York and Erie Railroad Company received goods for transportation directed to a point beyond the terminus of their route, and known to be so by the shipper.

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At the time of receiving them the agent of the company told the shipper that it would be unnecessary for him to have any one at the terminus to receive the goods, but that they would be shipped right through to the place of their ultimate destination. There being no evidence that the company received, or agreed to receive, freight for the entire distance,—*Held*,

- I. That the company were not liable, as common carriers, for the safe carriage and the delivery of the goods at their final destination. They were liable, as common carriers only, to the terminus of their road, and thereafter their liability was that of forwarders.
- II. That their duty as forwarders was fulfilled by their delivering the goods at their terminus to a transportation line engaged in transporting merchandise to the place to which the goods were directed.(a)

The difference between common carriers and forwarders considered, and their respective duties and liabilities compared.

APPEAL by defendants from a judgment of the Marine Court. The action was brought by the plaintiff as assignor of one Nicholas A. Knox, to recover damages against the defendants as common carriers, for the loss of merchandise, consisting of two half pipes of brandy, delivered to the defendants for transportation, directed to St. Paul, Minnesota. The goods were safely carried by the defendants to Dunkirk, the terminus of their road. They were there delivered to a transportation line connected with the defendants' road, and engaged in transporting merchandise from Dunkirk towards St. Paul. They never, however, arrived at St. Paul. There was no evidence as to whether the defendants received freight for the entire distance, or only for transportation over their own road. The Marine Court gave judgment for the plaintiff, and the defendants appealed. The facts upon which the plaintiff relied to hold the defendants liable are fully stated in the opinion of the court.

*Eaton and Davis*, for the appellants.

*Calvin Noyes*, for the respondent.

DALY, J.—This was an action to recover the value of two

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(a) Compare *Louis Krender v. Henry H. Woolcott and others*, ante, p. 223.

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half pipes of brandy. They were delivered to the defendants, who gave a receipt for them in these words:

“ New York, 13th April, 1854. Received of James Auchincloss, in good order, per New York and Erie Railroad, two half pipes of brandy, marked Nicholas A. Knox, St. Paul, Minnesota Terr. Care B. H. Campbell, Galena, Ills.”

Knox, the owner of the brandy, directed it to be shipped according to the receipt. Before shipping it, he asked the general freight agent of the defendants, if it was necessary to have an agent at the terminus of their road, or at Chicago, to receive it of an attache of the road. The agent said it would be unnecessary, the pipes would be shipped right on through; Knox then told him how they were directed, and the agent said, “That is all that is necessary: they will be forwarded on to you.” It further appeared, from a written stipulation entered into upon the trial, that the goods were carried by the defendants to Dunkirk, the western terminus of their road, and there, in the usual course of transportation, delivered to a transportation line or company, connected with the defendants’ road, and engaged in transporting merchandise from that place towards the place of their destination, according to the custom and usage in respect to the transportation of merchandise.

There was nothing in the evidence to warrant the court below in finding that the defendants undertook to carry the brandy to the place of destination. They merely engaged to carry it to Dunkirk, the terminus of their road, and to ship it, or forward it from there by the usual line of conveyance to Galena, the place of destination, and this they did. Their liability, as common carriers, ceased at Dunkirk, and they then assumed the character of forwarders. *Van Santvoord v. St. John*, 6 Hill, 158; *Farmers’ and Merchants’ Bank v. Champlain Transportation Co.*, 18 Verm. 62; 18 id. 131; *Howe v. The New York and New Haven Railroad Co.*, 22 Conn. 1; *Nutting v. Connecticut River Railroad Co.*, 1 Gray, 502; 1 Parsons on Contracts, note p, 661. In *Weed v. Saratoga and Schenectady Railroad Co.* (19 Wend. 534), the

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two lines were connected together by an arrangement between themselves, and the defendants took the pay in advance of the conveyance of the plaintiff and his baggage for the whole distance. Such was also the case in *Hart v. The Rensselaer and Saratoga Railroad Co.* (4 Seld. 37), and in *Wilcox v. Parmelee* (3 Sandf. 610), the defendant agreed, in writing, to forward the goods of the plaintiff, from New York to Fairport, to the close of the season, at a certain rate per 100 lbs., and the court, though the word *forward* was used, held that this was an agreement, in substance, to carry the whole distance for a specified price. In these cases the carrier received, or it was agreed that he should receive, the amount paid for transport to the place of destination; and thus, having received, or contracted to receive, the full reward, he was bound to perform the entire service. But nothing of the kind appeared in this case. The inquiry made by Knox showed that he knew that the defendants' road terminated at Dunkirk. He merely asked if it would be necessary to have an agent at that place, or at Chicago, to receive the goods, and was told that it would not; that the goods would be "shipped right on through;" that they would be forwarded on to him; that the direction on the goods was all that was necessary; and what the defendants engaged to do upon the arrival of the goods at Dunkirk they did, by delivering them to a transportation line engaged in transporting merchandise from Dunkirk to the place where the goods were directed. The reply to Knox by the freight agent, that it would be unnecessary to have an agent to receive the goods at Chicago, that they would be shipped right on through, was, as respects anything beyond the terminus of his own road, but the expression of an opinion or belief that the goods would be duly forwarded, upon arriving at Chicago, to the place to which they were destined, and cannot be construed as an engagement or undertaking on his part, on behalf of the defendants, to carry them, or to be responsible for their carriage, to the ultimate place of destination.

Judgment reversed.

**BENJAMIN WING AND NATHANIEL B. DAVIDSON v. THE NEW YORK AND ERIE R. R. CO.**

W. shipped 144 barrels of potatoes by the B. C. & N. Y. R. R. for New York, paying them the freight for the entire distance. The potatoes were delivered by that company to the N. Y. & E. R. R. Co. at C., to be transported to New York by them. While in their custody and on the deck of a barge in the North River, they were frozen.

*Held*, that the N. Y. & E. R. R. Co. were liable to the owner for the injuries occasioned to the potatoes by the freezing.

An action can be maintained, by the owner of goods, against a carrier, in whose custody they are injured, although there is no privity of contract between the owner and the carrier, and notwithstanding the contract was, in fact, made between the carrier and another carrier, who undertook the carriage of the goods for the whole distance, and received freight therefor.

The freezing of perishable articles, by reason of an unusual intensity of cold, is not such an intervention of the *vis major* as excuses the carrier, if the accident might have been prevented by the exercise of due diligence and care on his part.

The fact, that the carrier has done what is usual, is not sufficient to exempt him from a charge of negligence. He must show that he has done what was necessary to be done under all the circumstances.

The practice of entering judgment *pro forma* by stipulation, and without prejudice to the rights of the parties, in the Marine or district courts is improper, and cannot be sanctioned by this court. In all such cases, the judgment will be considered final and conclusive upon questions of fact, unless clearly against the weight of evidence.

Where judgment is rendered for the plaintiff, for an amount fixed by stipulation between the parties, the plaintiff is entitled to costs in addition thereto, although they are not mentioned in the stipulation.

**APPEAL** by defendants from a judgment of the Marine Court. This was an action brought against the defendants, as common carriers, for injuries to a shipment of potatoes while in their charge. The potatoes in question were shipped by the plaintiffs on the Buffalo and Corning Railroad for New York, that road receiving freight for the whole distance, and undertaking their safe delivery in New York. By that road they were carried to Corning, where they were delivered to the defendants.

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The defendants brought them on to Piermont, and there, after a delay of two days, shipped them on a barge connected with their line for New York. While on the barge they were frozen, and for the damages thus caused them this action was brought. A judgment was rendered *pro forma* in the Marine Court for the plaintiff, for \$350, that amount being agreed on by stipulation between the parties. Judgment was rendered with costs

*Eaton and Davis*, for the appellants.

I. If defendants can be held responsible to plaintiffs, it must be either on the ground that there is a privity between the parties, plaintiffs and defendants, so that they are mutually bound to each other upon the contract to carry safely, or that the defendants are responsible for a positive and affirmative wrong or tort committed to these goods while in their possession, that is, that plaintiff being a third person (no express contract having been made with them), the defendants, to be made liable to them, must have been guilty of a misfeasance, or positive wrong, and must be charged as a wrong-doer, and not merely guilty of a non-feasance or omission of duty.

A. They cannot be held on any express contract entered into between plaintiffs and defendants below, for the evidence shows that the only express contract was made by plaintiffs, with the first company, by which that company received the goods, and agreed to transport them to New York, and received the compensation for carrying them the whole distance, and by which we claim they are the only parties liable to plaintiffs, if any, for the safe delivery of the potatoes in New York. *Wilcox v. Parmelee*, 3 Sand. 610.

B. That the Buffalo, Corning and N. Y. R. R. Co. is liable, under their agreement, for the safe delivery of these potatoes in New York, there can be no question, for it is well settled law, that, in the absence of any express contract, "if a carrier, knowingly, receive a parcel directed or consigned to any particular place, he undertakes to carry it there himself, unless he makes known a different purpose and undertaking to the owner" (1

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Parsons on Cont. p. 686), or unless a different undertaking must be implied from the known usages and customs of the business, as when a carrier has a certain and well-known route; and *a fortiori* they are liable in this case by their express agreement.

C. There is no express agreement between plaintiffs and defendants, neither is there any privity of contract on the ground of sub-agency between them, for the contract between the Buffalo, Corning and N. Y. R. R. Co. and plaintiffs being express, that the said company should deliver this property in New York, there can be no implied authority given by plaintiffs to said company to employ a sub-agent (to substitute or delegate). They agree to do it themselves. The relation between the defendants below and the Buffalo and Corning Company being strictly that of service, and to them the rule *respondeat superior* applies; for it is a well-settled rule of law that a party can be held liable to the principal (in this case the shippers) as a sub-agent, only in cases where the superior agent had power to create a sub-agency. See Story on Agency, § 201, and cases cited in note 2, § 217, a; *Drury v. The Manhattan Co.*, 2 Denio, 115. Affirmed in 5 Denio, 639. And we claim in this case that the first company has, by its express promise, deprived itself of the right to appoint a sub-agent. See *Mullory v. Burrett*, 1 E. D. Smith, 284. It follows, therefore, that the defendants below could only render service, and are responsible only to their principal for any negligence or omission to perform that service. Story on Agency, § 217, a, and cases cited in note 5; *id.* § 308 and notes 4 and 5, and cases cited; *Stevens v. Babcock*, 3 Barnwall & Adolphus, 354; *Pinto v. Santos*, 5 Taunton, 447; *Lane v. Cotton*, 12 Mod. 488; *Alexander v. Southey*, 5 Barn. & Ald. 247; *Montgomery County Bank v. Albany City Bank*, 3 Selden, 459. On this branch of the investigation, we claim that the relation of agency or of service must be established between plaintiffs and defendants, to hold defendants liable.

D. To make defendants liable to plaintiffs, on the contract, there must have been a mutuality of obligation, and the de-

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fendants, in the court below, could not have recovered of the plaintiffs, in an action against them, the compensation for carrying the potatoes in question. This has been decided by many well-adjudicated cases. *Shawling v. Tomlinson*, 6 Taunton, 147. *Cull v. Backhouse*, 6 id. 148, n; *Montgomery County Bank v. Albany City Bank*, 3 Selden, 459. See also *Blake v. Ferris*, 1 id. 48, as to responsibility of agents and servants.

E. All that defendants did in this case was, to bring the car of the Buffalo, Corning and N. Y. R. R. Co., containing the potatoes, over their road to Piermont, and then forward them to New York; they merely doing this for the first company. This, we claim, is mere service and not sub-agency, and makes the first company the superior, and alone answerable to the plaintiffs. Story on Agency, § 310, note 2, says: "If the servant of a common carrier negligently loses a parcel of goods intrusted to him, the principal, and not the servant, is responsible to the bailor or owner." And the rule holds here also. See *Lane v. Cotton*, 12 Mod. 488, and *Blake v. Ferris*, 1 Selden, 48.

If we are right in this, that the Buffalo, Corning and N. Y. R. R. Co., in this case, is a *superior*, it follows that we are not liable to plaintiffs, for there can be only one superior for one subordinate. *Blake v. Ferris*, *vide supra*.

We certainly are liable to the first company for a non-performance, after having undertaken the service, and that company to us, for the compensation for such services.

II. The defendants below are not liable to plaintiffs below for any positive or affirmative wrong, or tort committed to these goods while in their possession; the acts complained of being solely of a negative character—a mere nonfeasance or omission of duty, for which the principal or contracting party alone is liable. Story on Agency, p. 398, § 308, and cases cited; 1 Parsons on Contracts, 87 and note a, a; *Wright v. Wilcox*, 19 Wendell, 343; *Lane v. Cotton*, 12 Mod. 488; *Vanderbilt v. Richmond Turnpike Co.*, 2 Com. 479. And assuming the truth of our first position, that there is no privity between the adverse parties to the record, and, therefore, that defendants are not liable on contract,

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we may dismiss this part of the case, for the non-liability of defendants must follow as a corollary, there being not the slightest evidence in the return of the justice showing a tortious act, or positive wrong on their part.

III. Assuming that there is a privity of contract in this case, and that there is delay which is not excused (both of which we deny), still defendants are not liable for injury to these goods by freezing, it not being a loss resulting from the delay, but caused by *vis major*.

A. It is a settled rule of law that a common carrier is not liable in damages for an injury to goods, while being transported, which is not the *natural and necessary* consequence of the act complained of, and the general rule as to damages applies. *Webber v. The N. Y. and Erie R. R. Co.*, 19 Barbour, 38; *Vander-slice v. Newton*, 4 Com. 130; *Walrath v. Redfield*, 11 Barbour, 368; Sedgwick on the Measure of Damages, pp. 65, 66; *Hargous v. Ablon*, 3 Denio, 406; *Mosier v. The U. & S. R. R. Co.*, 8 Barb. 427.

B. Here it will not be contended that the freezing was produced by the delay; the two are totally distinct, having no connection whatever, the one not a consequent of the other.

C. The freezing and damage would have been precisely the same, if there had been no delay, which shows that one is not the natural result of the other. To be recoverable, the damage must flow directly from the delay. 19 Barbour, *ubi supra*. Here the damage is created by a totally distinct element, over which defendants have no control, and against which they cannot provide. If the damage in this case had resulted from some natural quality inherent in the article (as natural decay, fermentation or the like), it might be said that the delay was one of the elements which caused the loss; but this cannot be said when the loss is occasioned by some outside influence, as frost. Besides, the evidence shows that these potatoes, if forwarded immediately, must have frozen before they could have been delivered, it being freezing weather at the time of their arrival

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at Piermont, and continued so until they were delivered in New York.

IV. The judgment should be reversed, for the reason that it was not entered according to the stipulation, it being for \$350 and costs, instead of \$350, the amount agreed upon.

*T. D. Pelton*, for the respondents.

I. The defendants were liable as common carriers. They received the property (and commenced its transit to New York city); and, having done so, are accountable to the owners of these goods for their safe delivery. *MERCHANTS' BANK v. THE JERSEY STEAM NAVIGATION COMPANY*, 6 How. U. S. Rep. 344; Chitty on Contracts, 480; Story on Bailments, 509.

II. The extent of a common carrier's liability is declared by law and fixed by considerations of public policy, independent of contract. *Hollister v. Knowlton*, 19 Wend. 239, and *Thurman v. Wells*, 18 Barb. 500.

III. The undertaking to carry the goods charged the defendants with the duty of carrying them safely for the benefit of the owners. *Nolton v. The Western Railroad Corporation*, 10 How. Pr. Rep. 97; 5 Sand. Rep. 180; 1 Caines' Rep. 45.

IV. The contract between the Buffalo and Corning Railroad Company and the plaintiffs, if any existed, was, in contemplation of law, a contract between the plaintiffs and defendants.

1. The law will often raise a privity when none in point of fact apparently subsists. It is enough that some benefit results from one party to the other, no matter how remote. It is sufficient that the defendants received the goods (and commenced their transit to New York city) to make them privy with the plaintiffs as common carriers. In receiving the goods upon their road and commencing the transit, they undertook to carry safely to New York city, and were insurers against everything but unavoidable and inevitable accident; and, as a matter of law, they contracted with the plaintiffs to transport the goods to and deliver them to the plaintiffs' consignee in New York, pursuant to the terms of the contract. 6 How. U. S. Rep. 344 (cited above);

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*Wibert v. New York and Erie R. R. Co.*, 2 Kern. Rep. 245; 19 Wend. 537.

This privity exists even if the defendants are to be regarded as agents of the Buffalo and Corning Company, for the well-known customs and usages of the roads created an implied agreement between plaintiffs and defendants.

V. The court will look to the substantial parties in interest, to avoid circuity of action. 6 How. U. S. Rep. 344 (cited above).

BRADY, J.—The plaintiffs delivered to the Buffalo, Corning and New York Railroad 144 barrels of potatoes, to be transported from Rochester to New York, at the same time paying the price of such transportation. That road unites with the defendants' road at Corning, and the potatoes were sent over defendants' road to Piermont from thence. The route of the defendants terminates at New York, although the terminus of their rail is at Piermont. No particular arrangement exists between these companies, except that defendants deliver to and receive freight from Buffalo, Corning and New York Road at Corning, and have a fixed fare thereto and therefrom. There was no agreement of any kind between plaintiffs and defendants proved, and no agreement limiting the liability of either defendants, or the Buffalo and Corning company, as common carriers. The potatoes were received at Corning, as freight is usually received there by defendants, and when they arrived in New York were frozen; and it is alleged that they were so frozen by the negligence of the defendants. They arrived at Piermont on Saturday evening, December, 1855, but the way-bill of the car in which they were carried was not sent with it or brought with it, and the potatoes were necessarily detained until it could be procured, to ascertain their destination. The way-bill was sent for, and was received on Tuesday following the arrival of the potatoes at Piermont. Whether the defendants or the Buffalo, Corning and New York Road were responsible for the omission to bring or send the way-bill, does not distinctly appear. The testimony is, that the conductor did not bring it,

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but whether the conductor was the servant of the defendants or the other company is not stated or established. On Tuesday the potatoes were put on the barge of defendants, at Piermont, to be sent at 4, P. M., of that day to New York, and Mr. Kimball examined one barrel while the defendants were loading them on the barge. The potatoes in that barrel did not appear to be frozen, and the agent then told Mr. Kimball that a number of the barrels which had been unheaded were not frozen. On Wednesday morning, at about 5 o'clock, that being the day succeeding the day on which the potatoes were put on the barge, they arrived in New York. Mr. Kimball saw them during the morning of that day, and they were frozen badly.

It seems, from this statement of the facts, that the delay at Piermont was not the immediate cause of the damage to the potatoes, and justifies the conclusion that on their transit from that place to New York they were frozen.

The defendants insist that they are not liable, because there was no contract, express or implied, between them and the plaintiffs, and that, in any aspect of the case, the Buffalo, Corning and New York Road are alone responsible to the plaintiffs; but if it should be held that they are liable directly to the plaintiffs, then that they are so only for the omission of due diligence in the delivery of the potatoes, there being no agreement limiting the time for such delivery; and further, that the potatoes having been frozen, the loss resulted from the intervention of the *vis major*, which in any event discharges them from liability.

A great variety of questions, growing out of the relations of the companies and the plaintiffs to each other, have been presented by the appellants with great ingenuity, and discussed ably and elaborately by appellant and respondent. It will not be necessary, however, to consider many of them, because the right of the plaintiffs to sue the defendants directly seems to be settled by several well-adjudicated cases. *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. U. S. Rep. 330; *Sanderson v. Lambertson*, 6 Binney, 129; *Green v. Clarke*, 2 Kern. 343; 2 *Greenleaf Ev.*, § 210. The defendants, however, were not liable,

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unless guilty of negligence in the transportation or manner of carrying the freight. Freezing is the act of God, and an excuse, if the carrier be blameless. On that question the court below has found for the plaintiffs, and we see no reason to disturb that finding.

It is said, by the appellants, that the judgment was entered *pro forma* by stipulation, without prejudice to their rights in any respect. We cannot sanction the practice of such a proceeding, and will in all cases regard the finding of the court below conclusive, unless clearly against the weight of evidence. Such is the established rule of this court.

But as to the negligence of the defendants. The weather was very cold, and had been for some days previous to the day on which the potatoes were examined by the witness Kimball, and was for some days subsequently, as appears by a table which forms one of the exhibits, showing an average of thirty degrees, and which table is accompanied by an admission that the thermometer fell ten degrees at night, during the period over which that table extends. The potatoes were perishable, and had been kept at Piermont nearly three days; they were not injured by that delay, however, and the attention of the employees of the defendants, or one of them, was called to both of these circumstances. When placed on the barge, they were put upon the upper deck, which was enclosed, it is true, but there was nothing to prevent their being placed below deck. The only excuses offered for not putting them there are, that they were put in the usual locality, and it would have taken some time longer to do it. The fact, that they were perishable, imposed upon the defendants more than ordinary care and diligence as mere bailees, and the obligation to deposit them most securely against cold. That it would take longer to do it does not relieve them of the duty. The intensity of the cold created also the obligation of additional vigilance, and what was usual was not the consideration. What was necessary to be done under all the circumstances was the true criterion. "The freezing of our canals or rivers has indeed been held such an intervention of the *vis major*

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as excuses the delay of the common carrier by water; but still he is bound to exercise at least ordinary forecast in anticipating the obstruction—to exert the proper means for overcoming it, and to exercise due diligence in accomplishing the transportation as soon as it ceases to operate. In the mean time he must not be guilty of negligence in taking care of the article detained." *Bowman v. Teal*, 23 Wend. 310.

We have no doubt that the defendants did not take the care which the law exacts from carriers in the discharge of their duties, and that, as we have stated, the plaintiffs' property was damaged by their negligence. !

The amount which the plaintiffs were entitled to recover, the defendants being liable, has been passed upon by the court below under a stipulation limiting the sum; but it is said that the judgment is erroneous, because the court awarded costs to the plaintiffs in addition to the amount agreed upon. There is no error in this. Costs followed as a matter of course upon the plaintiffs' recovery, and, if the defendants wished to protect themselves against the payment of them, they should have inserted it in the stipulation.

There is nothing in this case to justify the theory that the potatoes were frozen after their arrival in New York, and by reason of the delay of the plaintiffs in removing them. The proof establishes that the freezing took place after they were put on the barge for carriage to New York, and such must have been the judgment of the court below.

Judgment affirmed.

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#### LUDWIG SEMLER v. THE COMMISSIONERS OF EMIGRATION.

S, an emigrant, arriving in New York, was, under the rules of the Commissioners of Emigration, placed on board a barge with his baggage, for the purpose of being landed. The barge belonged to and was in the custody of certain railroad companies, who had ticket offices in Castle Garden, the premises of the Commissioners

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of Emigration. Upon landing, the baggage was transferred to the wharf by the employees of the railroad companies, in whose charge it was left for the purpose of being weighed and marked, while S. was required to enter Castle Garden in order to have his name registered, pursuant to the rules of the commissioners. During S.'s absence for this purpose, his baggage was lost.

*Held*, that the Commissioners of Emigration were not liable therefor. The baggage was not in their charge, nor in the charge of any one in their employ. The remedy of S., if any, was against the persons in charge of the baggage, or their employers, the railroad companies.

**APPEAL** by defendant from a judgment of the Marine Court. This was an action to recover damages for lost baggage, belonging to Martin and Lucas Schmidt, the plaintiff's assignors, who were emigrants, and whose baggage was lost at Castle Garden under the following circumstances :

The Commissioners of Emigration allow certain railroad companies, running out of New York city, to keep ticket offices in Castle Garden. These companies provide a barge, by means of which all emigrants are landed on their arrival. Their luggage is taken by the barge at the same time, and placed upon the dock. The emigrants are required first to enter Castle Garden and have their names registered ; they are then permitted to go to the dock and select their baggage, which is left there in charge of a weighmaster employed by the railroad companies. By him it is marked with the address of its intended destination, or, if the emigrant desires to remain in the city, it is given to him.

Martin and Lucas Schmidt arrived in this city the 3d of September, 1856, in the St. Nicholas, were taken, in company with the other emigrants, and with their baggage, on board the barge, and were by it landed at Castle Garden. When last they saw their baggage it was upon the barge. Upon going to the dock to get it, and have it properly marked, it was nowhere to be found. This action was brought against the Commissioners of Emigration to recover its value. Judgment was rendered for the plaintiffs, and the defendants appealed.

*John E. Devlin*, for the appellants.

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*Robert Johnston*, for the respondent.

INGRAHAM, FIRST JUDGE.—The evidence shows that the barge, on which the baggage was lost, was in the employ of Burns, and was provided by the railroad companies, and not by the defendants. Those companies, from motives of interest on their part, have adopted, with the consent of the defendants, this mode of effecting the landing of emigrants. On delivery to the emigrant, at the ship, on board of the barge, of his luggage, the ship-owners are discharged. If any loss occurs before reaching Castle Garden, the persons liable would not be the defendants, but the person in charge of the barge and his employers. Throughout this case the fact is undisputed, that the defendants do not employ the person in charge, or provide the barge. That is done by the railroad companies. From the ship, therefore, to the place of landing, it could not be pretended that the defendants are responsible. The baggage is not in their charge, nor in the charge of any person in their employ. They may prohibit his landing at the Garden by withdrawing their consent, but that does not make them responsible for his acts, as the owners and employers are.

Is anything done after landing that transfers to the defendants the custody of the property of the emigrants? From the testimony, I think there is no evidence of any such transfer of the possession. They require the emigrant to enter the building, to comply with the requisites of the statutes, in being registered, &c. They prohibit him from bringing upon their premises, or within their control, the very baggage which they are charged as having in their custody. They compel him to leave his baggage on board of the barge, which does not belong to them, and where the same liability continues which existed on receiving the baggage from the ship; and after complying with the provisions of the law in regard to the emigrant, they permit him again to return to the barge, there to take possession of his baggage from the barge, where it originally was placed.

I can find in this proceeding nothing which will warrant the

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finding that at any time the baggage was in the custody of the defendants, or of persons in their employ.

No matter how harsh it may appear, to compel the emigrant to leave his baggage on board of the barge, still such acts are not sufficient to charge the defendants as bailees when the custody of the property is elsewhere.

My conclusion is, that the defendants cannot be held responsible as bailees, but that the remedy for any loss is against the person in charge of the property, or of his employer, and that the judgment must be reversed.

Judgment reversed.

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#### JOHN BRUCE v. JOHN P. LORD.

The acceptor of a draft, drawn upon him personally, and accepted by him, with the addition to his name of the words "Treasurer Neuvitas M. Co.," is *prima facie* personally responsible for the acceptance. Such an addition is only a *descriptive personal name*, and does not absolve him from personal responsibility.

In an action upon such an acceptance, he may discharge himself by showing that he accepted it as agent, and by authority of such company, and that the plaintiff was aware of the fact at the time of taking the draft. But the proof for this purpose must be of such a nature as would be sufficient to establish the liability of the company in an action against it upon the draft.

Authority to thus accept on behalf of a company cannot be proved by parol. It can be conferred only by a resolution of the board of directors, and the resolution must itself be produced. DALY, J., dissenting.

**APPEAL** by plaintiff from a judgment of the Marine Court. This was an action against the defendant as acceptor of a draft drawn upon him, and accepted in these words: "Accepted, John P. Lord, Treasurer Neuvitas M. Co., 31 Oct., 1854." Upon the trial parol evidence was offered by the defendant and admitted under the plaintiff's objection, for the purpose of showing that the draft was accepted by the defendant as treasurer, and by the

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authority of the Neuvitas Mining Company. The nature of this evidence is fully stated in the dissenting opinion of Judge Daly. Judgment was rendered for the defendant, from which the plaintiff appealed.

*J. B. Auld*, for the appellant. I. It was necessary for the defendant to show authority from the Neuvitas M. Co. to accept for them. *Rossiter v. Rossiter*, 8 Wend. 494; *Atkinson v. St. Croix M. Co.*, 11 Shep. 171; *Moss v. Livingston*, 4 Coms. 208. II. Parol evidence was inadmissible for this purpose. *Hills v. Bannister*, 8 Cow. 81; *Tassey v. Church*, 4 Watts & Sergt. 346; *Moss v. Livingston*, 4 Coms. 208.

*Field and Sluyter*, for the respondents, cited *Mott v. Hicks*, 1 Cow. 513; *Rathbun v. Budlong*, 15 Johns. 1; *Pentz v. Stanton*, 10 Wend. 271; *Brockway v. Allen*, 17 ibid. 42; *Hicks v. Hinde*, 9 Barb. S. C. R. 528; *Watervliet Bank v. White*, 1 Denio, 608; *Babcock v. Beman*, 1 Kern. 202.

INGRAHAM, FIRST JUDGE.—The case of *Moss v. Livingston* (4 Com. 208) decides that an acceptance like the present bound the party making it personally, unless it appeared that he had authority from the company to bind them by such acceptance; and the case of *Brockway v. Allen* (17 Wend. 40) establishes that such an acceptance does not bind the party making it, if it appear that it was made by the authority of the company to bind them, and that the plaintiff had notice of such agency.

The facts necessary to establish this defence, under the case of *Brockway v. Allen*, are all sufficiently proven, except that of the defendant's authority. This was attempted to be shown by the drawer of the draft, who said that the defendant had authority to accept as secretary and treasurer; and by the testimony of Joseph L. Lord, who said that the defendant was secretary and treasurer, and had power to accept it; that he knew this, as he was present when the arrangement was made.

To this evidence the defendant's counsel excepted, upon the

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ground that the authority, if any existed, was in writing, and could not be proved by parol. A company cannot authorize a third person to bind them, except by a resolution of the board of directors. Such resolution being in writing can only be proven by its production, or by authority executed in pursuance of it. The plaintiff, before he was deprived of the right which the law gave him against the defendant as acceptor, was entitled to be furnished with proper evidence, by which he could establish such claim against the company. Mere parol proof that the defendant had, in the opinion of the witnesses, authority to bind the company, would never be held sufficient to make the company liable on such an acceptance, and it is not sufficient to defeat what otherwise would be a valid claim against the defendant. It may be that on another trial the defendant may be able to produce proper evidence to establish this defence; but, for the error above mentioned, I think the judgment should be reversed.

BRADY, J.—Concurred.

DALY, J. (dissenting).—In the indorsement of commercial paper, any qualification accompanying the signature of the indorser, such as *agent*, which was the case in *Mott v. Hicks* (1 Cow. 514), which goes to show that the indorser did not intend to make himself personally responsible, absolves him from liability. An indorsement effects two distinct and different purposes—the transfer of the paper, and an engagement to be responsible in the event of non-payment by the parties primarily liable. The indorsement transfers the paper, but the indorser may qualify the act so as not to be responsible in the event of non-payment. *Babcock v. Beman*, 1 Kern. 200. But the acceptor of a bill of exchange, like the maker of a note, is considered as the original and principal debtor, and primarily liable; and unless by the act of acceptance it appears that he is not, and that his acceptance is with the design of charging another primarily liable upon the bill, he is personally responsible. As, for instance, where a bill is drawn upon a corporation, and the president, or other

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officer having authority so to do, accepts it, designating the official character in which he acts; in such a case he incurs no personal responsibility, apparent upon the face of the instrument, for the act purports to be the act of the corporation. In this case the draft was drawn upon the defendant individually, but he accepted it by the designation of "Treas. Neuvitas M. Co." On the face of the instrument this was a mere *descriptio personarum*, as was the case in *Tuft v. Brewster* (9 Johns. 334), and *Hills v. Bannister* (8 Cow. 81). But the defendant introduced the drawer as a witness, who testified that he was the agent of the Neuvitas Mining Company, and that he drew the draft for the use of the company, having authority so to do. He also testified that the defendant was the secretary and treasurer of the company, and had power, as secretary and treasurer, to accept drafts drawn by the witness for the company; that he had never seen the defendant's authority to bind the company, but he (the witness) supposed that the defendant had it. Another witness was called by the plaintiff, who testified that the defendant had power to accept the draft, as he was present when arrangements to that effect were made. This witness also proved that he was present when the draft was presented for acceptance, that defendant declined to accept until he had advice from the drawer; that the plaintiff urged him to accept it, but the defendant answered that he would assume no personal responsibility; that if he accepted it, it would only be as treasurer of the company; and on receipt of advice of the drawing of the draft he would be ready to accept it; that the plaintiff then took it away, and brought it back after advice had been received, and the defendant accepted it. Another witness was also called, and testified that the defendant was elected secretary and treasurer by the directors of the company, and that the drawer had authority to draw, and the defendant to accept drafts, by advice and consent of the directors. To all this testimony the plaintiff objected. There can be no doubt but that it was competent for the defendant to show that, though liable *prima facie* upon the bill, he, in fact, accepted it for and on behalf of the company, with the plaintiff's knowledge.

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*Brockway v. Allen*, 17 Wend. 41; *Grafton Bank v. Kent*, 4 New Hamp. 221, and cases collected in 4 Cow. & Hill's Notes, 5 ed., 607, part 2, note 299. There might be more question as to the evidence given to show the defendant's authority to accept drafts on behalf of the company. It is very much stronger than in a case recently decided in this court—(*Knight v. Lang*, 2 Abbott, 227)—and I am inclined to think that it was sufficient. The circumstances under which the acceptance was made having been fully known to the plaintiff, the defendant having authority to accept bills drawn by Gillingham for the company, the court below gave judgment properly for the defendant.

Judgment reversed.

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#### JACOB ULRICH v. HUGH McCABE.

The owner of a house, injured by blasting, has a right of action for the damage against the contractor, under whose supervision the blasting was done.

In such a case, the fact of the accident raises a presumption that the blast was not properly covered.

It makes no difference that the plaintiff's house stood upon leased land; or was itself hired by him. In the latter case, he would presumptively be liable to his landlord to repair the injury, and can recover the value of the necessary repairs from the contractor.

In an action to recover for such an injury, it is immaterial whether or not the tenant, under his agreement with the landlord, was bound to keep the premises in repair; because he must either make the repairs rendered necessary by the injury, or lose the beneficial enjoyment of the property.

APPEAL by defendant from a judgment of the Seventh District Court. This was an action to recover damages for injuries occasioned to the plaintiff's house by blasting done under the supervision of the defendant. The evidence for the plaintiff showed that he was the owner of a house on the corner of Forty-sixth street and Tenth avenue, which stood, however, on leased ground; that the defendant was the contractor having in

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charge the making of a sewer in Forty-sixth street; that at one of the blasts, some stones were thrown upon the plaintiff's house, and he was obliged to pay \$20.50 to repair the injury done. The evidence of the defendant's connection with the blasting was the testimony of a witness to his admission, that he was the contractor having it in charge.

At the close of the plaintiff's case, the defendant moved for a nonsuit upon the grounds: I. That the plaintiff was not the owner of the house damaged. II. That there was no evidence of damage. III. That it appeared the blast was covered as the law required. The motion was denied. The defendant offered some testimony tending to show that he was not the contractor for building the sewer. Judgment was rendered for the plaintiff, and the defendant appealed.

*Stillwell and Swain*, for the appellant.

*Van Antwerp and James*, for the respondent.

BRADY, J.—The appellant bases his appeal on four several facts, none of which appear by the return, viz.:

1. That the plaintiff was the tenant of the premises injured.
2. That the amount expended in repairs was \$19 only.
3. That the sum of \$19 included other repairs than those rendered necessary by the damage done, and
4. That the plaintiff admitted that the blast was properly covered.

The testimony, however, shows that the plaintiff was the owner of the house. That the amount expended in repairs was \$20.50, viz.: \$19 for the mason, and \$1.50 for carpenter's work, and that nothing was included but what was rendered necessary by the damage done. It does not appear, however, that the blast was properly covered, and, as I understand the return, there is no admission of that fact as alleged by the appellant. In the absence of proof on that subject, the presumption would be against such a proposition. If the blast, indeed, had been *proper*-

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erly covered, the damages sustained by the plaintiff, probably, would not have resulted from it.

The defendant *admitted* that he was the contractor, and the witness called for the defence does not disprove that fact. If his testimony created any doubt, the decision of the justice would be binding.

There is nothing in the case to show that the house of the plaintiff was a permanent structure, or part of the freehold. If it reated on the land without being fastened to the soil, or on stones resting on the surface, and not fastened to the earth, the plaintiff, as tenant, might have the right to remove it at the expiration of his term. The defendant cannot excuse himself by a mere hypothesis. If he had a defence, he should have proved it.

The appellant is mistaken in supposing that the tenant was not bound to repair, if the house was part of the fee. There is no proof on that subject, and for that reason the presumption is, that he was bound to uphold the premises in question from decay, and to render them, when his term expired, in such condition as reasonable use would permit. *Taylor's Landlord and Tenant*, 163, and cases cited. At all events, the landlord was not bound to repair during the term, without an agreement on his part so to do, and the tenant must either make the repairs, or lose the beneficial enjoyment of the premises. The latter circumstance entitles him to recover the expense of such repairs, whether the house was his or not, and whether or not the house could be removed by him at the expiration of the term.

There is no proof, as stated before, that the defendant properly covered the blast, and there is no admission by the plaintiff that it was so covered. It is true, that when a motion for nonsuit was made, it was *stated*, by the defendant's counsel, that there was such an admission, but it does not appear in the return. It is denied by the respondent, and the justice seems to have disregarded the statement, because, after setting forth the grounds upon which the nonsuit was urged, and on which the statement of the admission is included, he adds: "all of which was over-

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ruled by me," and by which I understand him to mean that he repudiated such statement as inconsistent with the proof, and denied the motion for nonsuit as well. The appellant, however, could have protected himself from any doubt on that subject by an amended return. He has not procured it, and must take the consequences.

The appeal presents nothing which justifies a reversal of the judgment, and it must be *affirmed*.

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GEORGE GREEN v. NAPOLEON J. HAINES and WILLIAM MILLER.

Where work is done under a contract, the specifications of which are departed from by direction of the defendants, such a departure excuses performance within the time limited by the contract, and the obligation thereafter is to complete the work within a reasonable time.

What is a reasonable time is a question of fact for the determination of the jury, or referee, upon all the evidence in the case.

In such an action, what facts amount to an acceptance by the defendants of the plaintiff's work; considered.

APPEAL by defendants from a judgment entered upon the report of a referee. This action was to recover for work and labor performed and materials furnished by the plaintiff, in the erection of a building in Fourteenth street, New York city, for the defendants. The answer averred that the work was not performed according to contract, nor within the time limited by contract, and claimed to recoup damages therefor. The referee found that the work was performed and the materials furnished under a written contract; that extra work was done and materials furnished at the defendants' request; that, although there was a delay in the completion of the building, it was occasioned by the defendants' acts; and reported in favor of the plaintiff for the full amount claimed. Upon the trial, one of the defendants' witnesses was upon examination excluded, upon the ground that

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he was a party in interest. From the judgment entered on this report, the defendants appealed.

*Busted and Wilson*, for the appellants.

*W. K. Thorn*, for the respondent.

DALY, J.—It was shown, by the testimony of several witnesses, that the specifications had been departed from by the directions of the defendants. This excuses performance within the time agreed upon, and the obligation thereafter is to complete the work within a reasonable time. It was shown, moreover, that the work was delayed through the act of the defendants, in delaying to remove a certain stairway.

By the contract, the work was to be finished by the 15th of October. It was not finished until about the 1st of November, according to the plaintiff's witness, or about the 15th of November, according to the defendants' witness. Whether this was completing the work within a reasonable time, was a question for the referee upon the evidence; and, in finding that it was, we cannot say that he erred. If it could have been completed at an earlier time, it rested with the defendants to show it, which they did not. It was in evidence, that after the work was claimed by the plaintiff to have been performed, he sent his journeyman to the defendants to ask if the work was finished according to the contract, and they said that it was, except in certain particulars. The journeyman finished those particulars, and then asked the defendants if there was anything more to be done to the work to finish it according to the contract, and they said there was not, and were perfectly satisfied. Upon the testimony above, the referee was justified in finding that the work was done according to the contract. If the defendants told the plaintiff's journeyman that there was nothing more to do, and that they were perfectly satisfied, that was an acceptance of full performance on their part.

The evidence supporting the finding of the referee, that the contract was fully complied with in respect to what was done,

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the character of the work, and that it was performed within a reasonable time, there is no claim upon the part of the defendants to recoup damages.

The exclusion of the witness Francis Harris is not made a point on the appeal by the defendants, and need not be considered.

Judgment affirmed.

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SAMUEL D. BEACH v. MICHAEL McCANN.

On the day to which this action was adjourned, the justice was engaged in the trial of another cause. Upon the statement of the plaintiff that the defendant did not intend to appear, he suspended that trial, and took testimony and rendered judgment in this case. Shortly thereafter, and before the time usually allowed by the justice before entering judgment by default, the defendant appeared for the purpose of trying the cause.

*Held*, that the judgment should be reversed, the inquest having been allowed out of the usual time, in consequence of misstatements to the justice by the plaintiff. *It seems*, that the mere fact, that the justice suspended the trial of one cause to take an inquest in the other, is no objection to the regularity of the judgment entered on such inquest.

APPEAL by defendant from a judgment of the Sixth District Court, taken by default. The facts sufficiently appear in the opinion of the court.

*William R. Stafford*, for the appellant.

*Van Antwerp and James*, for the respondent.

INGRAHAM, First Judge.—The justice, on the day to which the cause was adjourned, was engaged in the trial of a cause, which, by consent of parties, was suspended, and a judgment was rendered in this case, the defendant not appearing. He was induced to take this course, on the assurance of the plaintiff that the defendant did not intend to appear. In five minutes there-

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after the defendant's counsel appeared, but whether the plaintiff had then left court or not, does not appear.

Whether or not it is regular for the justice to suspend one cause and take up another, it is not material to decide in this case, although I have no hesitation in saying that, with the assent of parties engaged in the first cause, I can see no ground of objection thereto; and such a course may tend to save time to suitors, who otherwise would be compelled to remain until the previous cause was finished. Certainly the delay of the defendant, in not attending to his cause at the time appointed, should form no ground for objecting to such a proceeding. It would be holding forth a reward to negligence or indolence.

But where such a course is induced by misstatements to the justice, I think there can be no hesitation in saying that the proceedings should be reversed. In this case the justice certifies that it was his usual practice to wait thirty minutes, but that the plaintiff informed him that the defendant did not intend to appear, and that he took the inquest in consequence before that time. The information was untrue; it led the justice to do what under other circumstances he would not have done, and the judgment rendered under such circumstances ought not to be sustained.

Judgment reversed.

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ASA B. MEECH v. WILLIAM BROWN.

Upon the return of a summons in a district court, the clerk has the power, in the absence of the justice, to adjourn the cause, but not to join issue.

In such a case, the proper time for demanding a jury is not upon the return day, but after joining issue, on the day to which the cause has been adjourned.

This court will review the decision of a justice of a district court, denying a jury trial, although no exception to the decision was taken.

APPEAL by defendant from a judgment of the Sixth District Court. The facts sufficiently appear in the opinion of the court.

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*Woodbury and Churchill*, for the appellant.

*James McGay*, for the respondent.

BRADY, J.—On the return day of the summons, the justice was absent, and the clerk adjourned the action. This he had power to do. Session Laws, 1840, p. 123. He had no power to enter the pleadings, and the issue could not then be joined without the consent of the parties, and the issue was not joined. The defendant demanded a jury on such return day, and tendered the fees for the venire, but the clerk informed him "that that was not the time to demand a jury trial, and that he must wait till issue was joined on the adjourned day." On the adjourned day, the defendant, after issue joined, demanded a jury; his demand was not complied with, and his application was denied on the ground that *it was too late*. The clerk acted properly in deferring the demand for the jury until *after issue joined*. Such is the provision of the statute on that subject. Laws of the state relative to the city, p. 46, § 95. I think, however, that the justice erred in deciding that it was too late to demand the jury. His refusal was, doubtless, based upon the act of January 4, 1820, § 111, which provides "that it shall not be lawful for either of the parties, after the day on which *an order has been made for an adjournment*," to demand of the court that such action be tried by a jury. At that time, and until the act of 1840, *supra*, the clerk had no power to adjourn any action, and if the justice was absent the action abated. And it was not necessary, therefore, by any proviso in the act of 1820, to protect the defendant from the effect of an order for an adjournment *prior to issue joined*, if, indeed, any such proviso could be deemed necessary, had that act itself conferred the power to adjourn, on the clerk, given by the act of 1840. I think no proviso would even then have been necessary, and that the act of 1820 in no way conflicts with or intervenes the right of the defendant to a jury where the adjournment is made *before* issue is joined, in consequence of the absence of the justice. The act of 1820 contem-

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plates an order for an adjournment *by the court* and not by the clerk, and for these reasons the judgment must be reversed. To hold otherwise would deprive litigants, in the district courts, of the right of trial by jury in all cases where the justice is absent on the return day of the summons. Such a result is neither within the letter nor the spirit of the acts referred to.

I do not consider it an answer to this objection, that the defendant took no exception to the decision of the justice, and proceeded with the trial. The object of the court, in compelling a party to make his objection in time, is to enable his adversary to supply the defect, or correct the error, which forms the subject of the objection. The *exception* presents that objection to the court on a review, but the plaintiff withheld his consent for the jury, and thus placed himself beyond the equity of the rule referred to. Independently, however, of that view of the case, I think, under the bill of rights, and the provisions of the constitution, the right of trial by jury is so sacredly secured, that when it is denied, and that fact is brought to the notice of a court of review, it imposes a duty on that court which is paramount to all technical rules of practice, to see that the denial was justified by the laws of the land, and, if not, to remedy the wrong by the exercise of its authority.

Judgment reversed.

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JAMES HAUGHEY v. MATHEW A. WILSON.

An original summons in a district court, made returnable at 9 o'clock, A. M., and having been returned by a constable personally served, a judgment entered thereon by default is regular, and cannot be impeached upon appeal to this court by affidavits showing the copy summons, served upon the defendant, to have been made returnable at 10, A. M.

If the constable did not serve a copy of the summons upon him, he must seek his remedy by an action against the constable for a false return. The return cannot be impeached or brought in question on an appeal from the judgment.

The mere entry by the justice on the summons, of an adjournment of the cause, upon

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the defendant's default, does not render it irregular for him to proceed to try the cause, and render judgment prior to the adjourned day, the defendant not having appeared in the mean time.

This court will not, upon appeal, set aside a regular judgment entered on default in a district court, although the defendant excuses his default, and swears to a defence, if the ground of appeal, as specified in the notice, is simply for error in the judgment, not for relief upon the merits.

**APPEAL** by defendant from a judgment of the Sixth District Court, entered on default. The original summons in this action was made returnable at 9, A. M. It was returned personally served by a constable. Upon the return, the defendant did not appear, and the plaintiff asked for an adjournment, which was granted, and marked upon the summons accordingly. Shortly after, the plaintiff's witnesses entered, and at the request of the plaintiff the justice tried the cause, and rendered judgment in his favor. From this judgment the defendant appealed, upon the ground of its irregularity, and with the return submitted an affidavit showing that, in the copy summons served upon him, the hour of the return was 10 instead of 9, A. M. The papers also showed that he appeared at the court room at 10, A. M., but that judgment had been rendered against him.

*William R. Stafford*, for the appellant.

*R. M. Harrington*, for the respondent.

**DALY, J.**—The summons was returnable at 9 o'clock, and the return of the constable, that he served a copy of the summons upon the defendant, was conclusive. It gave the justice jurisdiction to proceed with the cause at that hour, and it cannot be impeached or brought in question on an appeal from the judgment. If the constable did not serve a copy of the summons, the defendant must seek his remedy against the constable by an action for a false return. 8 How. 353; 3 Wend. 202; 10 id. 300; id. 525; 7 id. 398; Cowen & Hill's notes, 1087.

The defendant not having appeared, the justice, at the plain

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tiff's request, made an entry upon the back of the summons adjourning the cause until the 27th, but the plaintiff's witnesses having subsequently appeared, the entry of the adjournment was disregarded, and the justice, before 10 o'clock, proceeded with the cause, and rendered judgment. The mere entry of an adjournment upon the back of the summons, which was disregarded immediately after, and the cause proceeded with, amounts to nothing. It is sufficient to support the judgment, that it is disclosed by the return that the justice proceeded with the cause within an hour after the time named in the summons upon the return day. He proceeded to hear and determine the cause within a reasonable time, which was all that was essential to render his subsequent proceedings regular.

The testimony, it is true, was very general, but it was sufficient to warrant the judgment.

If the appeal had been taken upon the merits, we might have relieved the defendant, as he excuses his default, and swears that he had a defence to the action, but that is not made one of the grounds of the appeal. The ground of appeal is for error in the judgment, and not for relief upon the merits.

Judgment affirmed.

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#### HORACE SCRANTON v. URIAH P. LEVY.

Whether the justice of a district court may open a judgment rendered by him on default through mistake, *quare?*

But if it be opened by consent of the parties, and the cause tried upon its merits, and on such trial a similar judgment rendered, it will not be deemed irregular, where it can be seen that the evidence justified the conclusion arrived at by the justice; and the power of the justice to open the default and proceed with the trial will not be inquired into on the appeal therefrom to this court.

APPEAL by defendant from a judgment of the Sixth District Court. This was an action for services rendered by the plaintiff's assignors, in making fifty doors for the defendant. Upon

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the adjourned day, the justice, through mistake, granted the plaintiff a judgment by default, an hour before the time to which the cause was adjourned; but, discovering his mistake, he opened the default, and the cause was tried upon its merits.

Upon the trial, the defendant offered in evidence a contract made by James C. Curtis and Albion K. Hodgson, by which they agreed to trim and finish up two houses belonging to the defendant, for \$240. He also introduced some evidence that they had not entirely completed the houses, together with receipts, signed by them, showing an over-payment. One of these receipts was for \$50, and was expressed to be on account of the work of trimming the house "*and making of fifty-two doors.*" The plaintiff's assignor testified, in rebuttal, that the agreement put in evidence and the receipts had been altered after they had signed them, that the words "*and finish up*" had been interlined in the agreement, and the words above, in italics, had been added to the receipt after execution, and offered evidence showing that they were prevented from finishing the work by the defendant. No evidence was offered contradicting this, and the justice thereupon allowed the judgment as rendered upon the inquest to remain unaltered. The defendant appealed.

*Asahel S. Levy*, for the appellant.

*Smith and Wells*, for the respondent.

BRADY, J.—The cause had been adjourned until the 25th April, 1856, at 11, A. M., and the justice gave judgment for the plaintiff prior to that time, under the impression that the action had been adjourned until 10, A. M. When on that day the defendant appeared, the judgment was opened, it is said, and the action tried in the usual manner. After the testimony had closed, the justice having discovered no reason why his finding should be altered, left his original entry of judgment as his judgment in the cause. The defendant now insists that the justice, having entered his judgment, could not open it, and that therefore his subsequent proceedings cannot be sustained. Without

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passing upon the power of the justice to open a judgment rendered by him, it is sufficient to say that the first proceeding, it is conceded, was without jurisdiction and void, and was so regarded by the parties when the defendant appeared; and that the second proceeding, which was regular and formed the basis of the judgment appealed from, was acquiesced in by the defendant, whose appearance and submission conferred jurisdiction upon the justice, even if he had no right to treat his previous trial as a nullity. The judgment in this case was rendered on a trial of the action, which was contemplated by the adjournment. Besides that, the objection should not, under the circumstances, have been taken, and would not be regarded, unless the duty of the court required its consideration. If the defendant desired to avail himself of the error, he should have appealed from the first judgment. He has waived technicalities, and must depend upon the merits. These being against him, the judgment will not be disturbed.

Judgment affirmed.

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LOUIS WILKIMING by his guardian WILLIAM RANDA, v.  
HENRY SCHMALE.

The mere fact that an action brought to recover for a debt due an infant is prosecuted by a next friend, instead of a guardian, will not render a judgment against him upon the merits void.

Such an error in a district court can only be corrected by an appeal. So long as the judgment remains unversed, it is a bar to any other action for the same cause.

APPEAL by plaintiff from a judgment of the Fourth District Court. This action was brought to recover wages claimed to be due Louis Wilkinson as clerk. The answer contained a plea of prior adjudication. The defendant, at the close of the plaintiff's case, produced a record of a former suit on behalf of the same plaintiff and for the same cause of action, by which it appeared

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that an action was brought by the plaintiff in his own name, originally, for the same cause; that, on the trial, the objection to the proceeding on that account had been waived, and a *next friend* had been appointed for the plaintiff by consent, in whose name the suit was thereupon continued; and that, at its conclusion, the court rendered judgment for the defendant upon the merits. This record was objected to, upon the ground that no *guardian* had been appointed in that suit for the infant. The objection was overruled, and an exception taken. The justice rendered judgment for the defendant, from which the plaintiff appealed.

*James McGay*, for the appellant.

*Taylor and Johnson*, for the respondent.

DALY, J.—It will not be necessary to determine whether the provisions of the Code respecting parties to actions apply to the justices' courts of this city or not, as it is wholly immaterial whether the plaintiff appeared in the former action by a guardian or by a *next friend*, as the error, if it was one, would not affect the validity of the judgment or render it void. It might be a ground for reversing the judgment for error in fact, and as the judgment was against the plaintiff, his remedy, if he appeared erroneously by a *next friend* instead of a guardian, was by taking an appeal and getting the judgment reversed. *Maynard v. Downer*, 18 Wend, 575; *Bloom v. Burdick*, 1 Hill, 130; *Schermerhorn v. Jenkins*, 7 Johns. 373; *Gardner v. Holt*, Strange, 1217; *King v. Code*, id. 413; *Hamlin v. Hamlin*, Bulst. 189. But as long as the judgment stood unreversed, it was a bar to any other action for the same cause.

Judgment affirmed.

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Oaksmith v. Sutherland.

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**SIDNEY OAKSMITH and BISHOP R. KEEPLER v. JAMES SUTHERLAND.**

The plaintiff has a right to discontinue, on payment of costs, at any time before the time to reply has expired, notwithstanding the interposition of a counter-claim in the defendant's answer.

APPEAL by plaintiffs from an order made at special term, allowing the plaintiffs to discontinue. The facts appear in the opinion of the court.

*R. F. Andrews*, for the appellants.

*B. Skaats*, for the respondent.

BRADY, J.—Before the time to reply had expired, the plaintiffs tendered the costs which accrue on a discontinuance before issue joined, and gave notice of discontinuance at the same time. Subsequently, and before the period to reply had elapsed, the plaintiffs gave notice of motion for leave to discontinue this action. The reasoning in *Bockle v. Underwood* (1 Abbott, 1) does not apply, therefore, to this case, the counter-claim not having been admitted by the plaintiffs. The notice of discontinuance and the tender of costs was all that the plaintiffs were required to do, if the right to discontinue existed. I had doubts whether, when a counter-claim was set up, the plaintiffs could discontinue without the defendant's consent, even within the twenty days allowed to reply, notwithstanding the case of *Seaboard and Roanoke Railroad Co. v. Ward* (1 Abbott, 46), but, on examination of the subject, I am convinced that the plaintiffs have the right absolutely. In this case I cannot understand how the defendant's rights can be prejudiced, inasmuch as the claim, if assigned, will be subject to the equities existing between assignor and debtor, and the debtor may be examined in his own behalf, if the assignor should be a witness for the assignee.

Order appealed from affirmed.

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Blakeman v. Mackay.

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**HENRY BLAKEMAN v. WILLIAM MACKAY.**

A distinct assertion of the quality of a chattel, made by the owner during a negotiation for its sale, which it may be supposed was intended to cause the sale, and was operative in causing it, is sufficient to constitute a warranty.

Whether the words used amount to a warranty or not, is a question of fact, and the finding of a justice upon the question will not be reviewed by this court, if there is any evidence to support it. So held in an action for breach of warranty of the soundness of oysters, the defendant's declaration being that "he cut holes in the ice and took them out fresh; that they were good, and in good order."

Various cases upon the question, What is sufficient to constitute a warranty? collated.

Defendant cannot avail himself of the defence, that he acted as agent in making the representation or warranty sued upon, unless he disclosed the fact of his agency at the time of the transaction out of which the suit arises.

**APPEAL** by defendant from a judgment of the Fifth District Court. This action was brought to recover damages for a breach of warranty on the sale of oysters. The defendant, besides denying the warranty, claimed to have acted in the sale as agent for the firm of Mackay, Skidmore & Cook. Judgment was rendered for the plaintiff, from which the defendant appealed. The principal question was, whether the facts proved showed a warranty. The facts are sufficiently stated in the opinion of the court.

*Bromley and Bovee*, for the appellant. I. There is no evidence in this case to sustain an action as for a false representation; because there is no evidence that the defendant knew the falsity of his statement. *Perry v. Arnon*, 1 Johns. R. 129; *Leonard v. Vredenburgh*, 8 Johns. R. 25; *Bovers v. Craft*, 18 ibid. 4. II. An implied warranty does not extend to the soundness or quality of an article, except in the case of provisions for *domestic use*, and not for *merchandise*. *Moses v. Mead*, 1 Denio, 378; S. C. 5 Denio, 617; and see *Dean v. Mason*, 4 Conn. R. 428; *Van Brachlin v. Fonda*, 12 Johns. R. 468. III. To constitute an express warranty, it must appear that the affirmation relied upon

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was intended as a warranty. *Seixas v. Wood*, 2 Caines' R. 48; *Swett v. Colgate*, 20 Johns. R. 196; 2 Kent Com. 479; *Waring v. Mason*, 18 Wend. 443. IV. On a sale of chattels, where there is an opportunity for inspection, and no fraud in the seller, nor any express warranty, the rule of *caveat emptor* applies. *Waring v. Mason*, 18 Wend. 438; *Swett v. Colgate*, 20 Johns. R. 196; *Moses v. Mead*, 1 Denio, 378; S. C. 5 Denio, 617.

*F. Byrne*, for the respondent.

BRADY, J.—The proof in this case establishes a warranty of the soundness of the oysters. The respondent said, during the negotiation for the purchase, "If the oysters were not good he did not want them," to which the appellant answered, that "he cut holes in the ice, and took them out fresh;" and the respondent then said he did not want them if they were not fresh. No principle is better established than that, to constitute a warranty, it is not necessary that express words of warranty should be used. *Chapman v. Murch*, 19 John. 290; *Swett v. Colgate*, 20 J. R. 203; *Oneida Man's Society v. Lawrence*, 4 Cow. 440; *Roberts v. Morgan*, 2 Cow. 438; 1 Parsons on Contracts, 463, and cases cited; 1 Smith's Leading Cases, 264, 265. A distinct assertion, or affirmation of quality, made by the owner *during a negotiation* for the sale of a chattel, which it may be supposed was intended to cause the sale, and was operative in causing it, will be regarded as implying or constituting a warranty. Parsons, *supra*, 163.

And again, "Any affirmation of the quality or condition of the thing sold (not intended as matter of opinion or belief), made by the seller at the time of sale, for the purpose of assuring the buyer of the truth of the fact stated, and inducing him to make the purchase, if so received and relied on by the purchaser, is an express warranty. See cases cited to sustain this doctrine in note "o" in Parsons, *supra*, 463. And again the rule cited from Peake on Evidence, and approved in *Chapman v. Murch*, *supra*, is stated as follows: "In general, any representation made

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by the defendant of the state of the thing sold, at the time of the sale, will amount to a warranty." But whether the words used amount to a warranty is a question of fact for the jury. *Duffee v. Mason*, 8 Cow. 25; *Whitney v. Sutton*, 11 Wend. 411. And the justice seems to have found in this case that they did. This finding cannot be disturbed. It is sustained by the evidence and the law. The respondent did not want the oysters if they were not good and fresh; and the appellant said "he cut holes in the ice, and took them out fresh." He said, also, that "they were good, and in good order." These statements were direct affirmations of their soundness, and operated to induce their purchase. It was what the respondent wished, and being thus assured, bought at once. It would seem, also, that he had, on a former occasion, made a purchase of oysters that did not suit him, and stated that he did not want the lot then under consideration if they were like the last, and was assured that they were not. The finding that these circumstances, with the statements of the appellant already mentioned, amounted to a direct affirmation of their soundness, is a conclusion not to be resisted.

It is said, by the appellant, that there is no evidence identifying the article sold by him to the respondent as the article alleged to be bad. This is not the fact. The witness Sullivan testified that some were sent away, the same day on which the purchase was made, to different oyster saloons, and some within an hour, and that they were discovered to be bad the next morning. Reed, the cartman, testified that he took some of them to customers, and the next morning, when he went with others, the customers "ordered him to take them back, they being bad." Then follows the testimony of several customers, who testified that they received a bad lot of oysters about the time of the alleged purchase and delivery by Reed. No other bad oysters appear to have been received by them about that, or at any other time. It also appears, from Sullivan's testimony, that most of the oysters were spoiled. Therefore it cannot be denied that there was some testimony on the subject of identity; and when there is testimony even of so doubtful a character as to justify a

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finding either way, the judgment of the justice, or the verdict of a jury, is conclusive, unless clearly against the weight of evidence. I think that, both as to identity and quality, there is nothing to warrant us in disturbing the finding of the court below.

In reference to the alleged agency of the appellant, it is sufficient to say that he dealt with the respondent as a principal, and not having disclosed his agency, the action was well brought against him.

Judgment affirmed.

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#### WILLIAM PEREGO v. HENRY PURDY.

Where, in an action for goods sold and delivered to defendant, upon his written order, the plaintiff proved an admission by the defendant, that the signature to the order for the goods was his, but it appeared that the defendant, at the same time, added that the goods were delivered on a credit which had not expired. *Held*, that the whole admission must be taken together.

There being no testimony in the case, but the defendant's admission, to charge him as drawer of the order, a judgment for the plaintiff was reversed as against evidence.

The general rule in such cases is, that the whole of the admission must be taken together; and if there is no evidence in the cause which contradicts the part which discharges the defendant's liability, that portion cannot be disregarded. Part cannot be taken and part rejected.

**APPEAL** from a judgment of the Third District Court. This was an action for goods sold and delivered, upon a written order signed by the defendant. To prove the signature, the plaintiff relied wholly on an admission of defendant. It appeared, however, by the cross-examination of the witness, who testified to this admission, that at the time when defendant made it, he also said that the goods were purchased on time; that he was to have them on a four months' credit; and that the credit had not expired.

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The action was commenced in less than four months from the sale.

The defendant's counsel moved to dismiss the complaint, which motion was denied. Judgment was rendered for the plaintiff, from which defendant appealed.

*W. C. Carpenter*, for the appellant.

*B. D. Wisner*, for the respondent.

**INGRAHAM, FIRST JUDGE.**—Upon the trial of this cause, the defendant's admission was received, that the signature to the order for the goods on which the action was founded was his, but he at the same time added, that the goods were delivered on four months' credit, and that the credit had not expired. The justice disregarded the latter part of the admission, and rendered judgment for the plaintiff.

The general rule is, that the whole admission must be taken together, and if there is no evidence in the cause to contradict the portion which discharges the liability, it cannot be disregarded.

In *Carver v. Tracy* (3 J. R. 427), the court said, the whole conversation must be taken together. The plaintiff could not take one part and reject the other.

In *Wailing v. Toll* (9 J. R. 141), the court said, the plaintiff relying upon the defendant's confession, that confession must be taken altogether.

In *Fenner v. Lewis* (10 J. R. 38), the judge said, if you will examine as to the confession of a party, you must take the whole confession together.

In *Credit v. Brown* (10 J. R. 365), the defendant's confession contained a justification, and the court said, there was no proof to charge the defendant, except his own confession, which the jury ought to have taken together, and not have charged him with doing the injury, without giving due weight to what he said at the same time in justification. See also 15 J. R. 229.

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This rule was sanctioned by the Court of Appeals, in *Lord v. Payne* (4 Comstock, 247), where it was held, that a party, seeking to make his adversary's books evidence in his favor, cannot do so without taking the whole account together. It is added in that case, "the accounts are received in like manner as the oral admissions of the party, the whole of which or none must be received. The defendant is concluded by it, unless he wholly disproves the items."

It is true that, under such circumstances, the whole admission is not entitled to the same degree of credit. Uncontradicted, it must be believed, but the adverse party may show by other evidence that such discharging matter is not true, or offer facts tending to discredit it with the jury, and then and only in such cases may they disregard it.

There was no evidence in this case but the defendant's admission to charge him as the drawer of the order, and there was nothing which warranted the jury in disbelieving the assertion made by him, at the same time, that the goods were sold on credit.

Judgment reversed.

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THE PEOPLE OF THE STATE OF NEW YORK v. MARTIN  
DEMING.

An action to recover a penalty for a violation of the law of 1847, concerning the pilotage of vessels in the East River at Hell Gate, should be prosecuted in the name of the master warden of the port of New York, and not in the name of the people of the state.

It is an invariable rule of construction, in respect to the repealing of statutes by implication, that the earliest act remains in force, unless manifestly inconsistent with and repugnant to a subsequent act upon the subject, or unless in the last act express notice is taken of the former one, plainly indicating an intention to abrogate it.

A repeal of a statute by implication is not favored; on the contrary, courts are bound to uphold the prior law, if the two acts may well subsist together.

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APPEAL by plaintiffs from a judgment of the Second District Court. This was an action to recover a penalty of thirty dollars, for a violation by the defendant of the ninth section of the act of 1847, concerning the pilotage of vessels in the East River.(a) The justice dismissed the complaint, upon the ground that the action should have been brought by the master warden of the port of New York. The plaintiffs appealed.

*A. Oakey Hall, for the appellants.*

*D. McMahon, for the respondent.*

BRADY, J.—The justice dismissed the complaint, upon the ground that the action should have been commenced in the name of the master warden of the port of New York; and although a variety of questions have been elaborately discussed, it is only necessary, for the purpose of determining this appeal, to pass upon the correctness of the judgment pronounced by the justice, for the reason assigned by him. It has not been considered necessary to present a review of the various statutes referred to in the arguments submitted, for the reasons which will be stated. Leaving the earlier legislative enactments, and commencing with the act of 1830, will give us all that is requisite to the investigation of the question involved. The majority of the acts are amendatory of preceding acts, and such is the fact in relation to the act of 1830, which is designated "An act to amend the act passed February 19, 1819, relative to the port wardens, harbor masters and pilots of the port of New York." It contains no repealing clause, but, by section 2 provides that, "if any person other than a branch or

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(a) That section reads as follows: "If any person other than a Hell Gate pilot, or one of the crew of the vessel, shall pilot for any other person any vessel of any description through the channel of the East River commonly called Hell Gate, or board such vessel for that purpose, or offer to pilot any vessel, he shall forfeit and pay the sum of thirty dollars for every such offence; or, on conviction thereof, be deemed guilty of a misdemeanor, and shall be punished as such." Acts of 1847, chap. 69, § 9, p. 75.

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licensed pilot shall pilot for any other person any vessel of any description through the East River, commonly called Hell Gate, or board such vessel for that purpose, he shall forfeit and pay the sum of thirty dollars for every such offence, to be sued for and recovered in the name of the master warden of the port of New York;" and then directs that, when so recovered, it shall be deposited in the savings bank, and constitute a charitable fund, to be disposed of for the benefit of indigent widows and orphan children of deceased East River pilots, under the direction of the board of wardens.

Here, then, is the penalty to be recovered, the person in whose name it shall be sued for, and the disposition to be made of it when recovered, expressly provided for beyond all question ~~or~~ peradventure. Then follows the act of 1832, the tenth section of which contains the same penalty for the same cause, but is silent as to the person by whom it shall be sued for; yet, in the eleventh section, we find that the half pilotage authorized by law to be collected, when a pilot shall be refused, shall be sued for and recovered in *the name of the master warden of the port of New York*—a provision which was omitted in the act of 1830, section 8, relating to that subject, providing only that it should be *paid over* to the master warden. Thus we perceive that the name in which the penalty of thirty dollars shall be sued for is omitted in section ten of the act of 1832; and supplied by section eleven as to half pilotage, which was omitted in act of 1830; and, by section twelve, all such acts or parts of acts as are *inconsistent with the provisions of the act* are declared to be repealed. Then follows the act of 1841, amendatory of the act of 1832, which, by the sixth section, repeals *such parts* of the sixth, seventh, ninth and tenth sections of the act amended as are inconsistent with it. There is nothing in this act which affects the penalty of thirty dollars above mentioned, and it remains undisturbed by this statute in any manner whatever.

Then follows the act of 1847, under which the penalty in this action is prosecuted. The ninth section provides for the penalty of \$30, for the same cause stated in the act of 1830, but omits to

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provide in whose name it shall be sued for, and to what purpose it shall be appropriated when collected. The eleventh section repeals all such acts, or part of acts, as are inconsistent with the provisions of the act; and upon these two sections, in connection with the other statutes referred to, depends the question under review.

A mere change of phraseology in a revision of the statute will not be deemed to alter the law, unless it evidently appears that such was the intention of the legislature. *Ex parte Brown*, 21 Wend. 316; *In the matter of Theriat v. Hart*, 2 Hill, 380, and note b.

In construing a statute, the intention of the legislature should be followed, wherever it can be discovered, although the construction adopted seem contrary to the letter of the statute. *Griswold v. National Ins. Co.*, 8 Cow. 89; 15 J. R. 380; *Crocker v. Crane*, 21 Wend. 211.

The invariable rule of construction, in respect to the repealing of statutes by implication, is, that the earliest act remains in force, unless the two are manifestly inconsistent with and repugnant to each other, or unless in the latest act some express notice is taken of the former, plainly indicating an intention to abrogate it. *Bowen v. Lease*, 5 Hill, 225. Hence a repeal by implication is not favored; on the contrary, courts are bound to uphold the prior law, if the two acts may well subsist together. Dr. Foster's case, 11 Cow. 63; Weston's case, Dyer, 347; 10 Mod. 118; Bac. Abr. statute (D); Dwarris, 673 to 675. Applying these principles to the case in hand, we have little difficulty in arriving at the conclusion that the justice was right, and that the action should have been brought in the name of the master warden of the port of New York. It must be borne in mind, that by the act of 1830, the action is to be brought in the name of the master warden. The tenth section of the act of 1832, which relates to the same subject and penalty, omits any provision on the subject of the person in whose name the suit is to be brought, and there is therefore nothing on that subject in the act of 1830 inconsistent with it. The same remark applies to the act of 1841,

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which contains nothing on the subject, and the same to the act of 1847, which preserves the penalty but does not provide in whose name the action shall or may be brought. There is nothing, therefore, in the act of 1847 inconsistent with that part of the act of 1830, which gives the right of action to the master port warden. The two statutes shall stand together, and both have effect, if possible, for the law does not favor repeals by implication, and all acts *in pari materia* should be taken together as if they were one law. *Bowen v. Lease, supra*; *McCartee v. Orphan Asylum*, 9 Cow. 347. There was no repeal in express terms of that part of the act of 1830, and, if repealed at all, it was repealed by implication only, which the law does not favor, as we have seen. In the repealing clauses of the various acts to which reference has been made, such acts and parts of acts only as are inconsistent, are affected, and this has an important bearing in considering the intention of the legislature. That intention is manifest in the phraseology adopted, and the repeals of parts of acts not inconsistent with the act passed cannot be interpreted to repeal parts of acts which are perfectly consistent with it, and the intention must prevail, as we have seen, even if such a construction must result, which is not the case here, as would seem contrary to the letter of the statute. *Crocker v. Crane, supra*. Because a thing within the intention is as much within the statute as if it were within the letter, and a thing within the letter is not within the statute if contrary to the intention of it. *The People v. The Utica Ins. Co.*, 15 J.R. 358. We think, therefore, that the act of 1830, relative to the name in which the penalty should be prosecuted, remains in full force and effect; that the justice was right, and that the judgment of dismissal must be affirmed.

Judgment affirmed.

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Spence v. Beck.

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WILLIAM J. SPENCE v. CARL BECK.

On the hearing of an appeal from a district court, the return of the justice cannot be contradicted or impeached by affidavit. It is conclusive in respect to the statements contained in it.

If a return is erroneous, it can only be corrected by a motion to the court.

APPEAL by defendant from a judgment of the First District Court, entered by default. On the return day of the summons, in this case, the defendant failed to appear until after the cause was called, and it was adjourned to the 25th of June, 1858. On that day the defendant was late, and did not enter the court room until after the cause had been taken up, and the justice had just finished taking the testimony of the plaintiff's witness. The appellant submitted, on the appeal, with the return, an affidavit that the justice refused to inform him of the nature of the plaintiff's complaint, or communicate to him what had been the testimony of the witness, though he gave him leave to cross-examine the witness, which he was unable to do, not knowing the nature of the testimony or of the complaint. The return and the respondent's affidavit stated that the defendant demanded to see the complaint, that the justice stated its contents to him, and also stated the testimony to him, but that he refused to hand him the complaint itself, as he was using it in the trial; that the defendant and his attorney thereupon went away again, and judgment was rendered for the plaintiff.

*R. H. Shannon*, for the appellant.

*D. Evans*, for the respondent.

INGRahAM, FIRST JUDGE.—None of the grounds, stated in the notice of appeal, appear in the return, but are contradicted by it. We can never suffer a return to be impeached by affidavit. If the return is erroneous, it must be corrected by motion

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to the court. On the appeal we are governed by the statements contained therein.

The justice states that he orally communicated to the party the complaint, and offered to permit him to cross-examine the witness, but that the defendant refused and left the court.

If the facts sworn to by the appellant had been returned by the justice as occurring on the trial, the judgment could not be sustained, but we are concluded by the return.

Judgment affirmed.

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JAMES LEE and BENJAMIN C. LEE v. JAMES AINSLEE and  
JOHN J. HICKS.

An appeal will be entertained from an order granting judgment on account of the frivolousness of a demurrer, taken before the entry of judgment thereon.

A complaint is sufficient which alleges everything which the plaintiff would be required to prove at the trial.

In a complaint upon a promissory note, an averment that the note, "before the maturity thereof, and for value received, lawfully came into the possession of the plaintiff," is a sufficient averment of ownership and title.

APPEAL from an order granting judgment on account of the frivolousness of a demurrer. The complaint in this case was upon a promissory note. It averred the making of the note by the defendant Ainslee, the indorsement of it by the defendant Hicks, the presentation for payment, non-payment, protest and notice thereof. The complaint did not state any delivery of the note to the plaintiffs, nor did it contain the allegation that they were the lawful owners and holders thereof, but it alleged "that said note so indorsed before the maturity thereof, and for value received, lawfully came into the possession of these plaintiffs." The defendants demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. On the plaintiffs' motion, a judgment was ordered on account of

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The frivolousness of the demurrer, and from the order an appeal was taken before the entry of judgment thereon.

*Dean and Townsend*, for the appellants. The complaint does not show that the note was indorsed *to* or *delivered to* the plaintiffs or any other person. Chitty on Bills, 130 to 139; 13 How. Pr. R. 118. See *Caswell v. Bushnell*, 14 Barb. 895. An averment that it lawfully came into the plaintiffs' possession is not sufficient for the court to infer therefrom that they are the *owners* of the note. An allegation that the plaintiff is the owner, or some equivalent allegation, is necessary. Code, § 111; *Snyder v. White*, 6 How. Pr. R. 321; *Temple v. Murray*, *ibid.* 329; *Genesee Mutual Ins. Co. v. Monyhen*, 5 *ibid.* 321.

*McOunn & Moncrief*, for the respondents. I. A decision of the court, granting judgment for frivolousness of a demurrer or other pleading, is a judgment and not an order. No appeal lies from such decision. Judgment must first actually be entered before an appeal can be taken. *Bentley v. Jones*, 4 How. Pr. R. 885; *King v. Stafford*, 5 *ibid.* 30; *Bruce v. Pinckney*, 8 *ibid.* 397; *Lewis v. Acker*, *ibid.* 414; *King v. Stafford*, 8 *ibid.* 127; *Bauman v. N. Y. Central R. R. Co.*, 10 *ibid.* 218; *Martin v. Kasthouse*, 2 *Abbot's R.* 390; § 247, Code.

II. The complaint is sufficient. (1.) It alleges:—

1. Making and indorsing of note by defendant Ainslee.
2. That defendant Hicks indorsed the same before its maturity.
3. That the note before maturity, and indorsed as aforesaid, came into the possession of the plaintiffs. This is sufficient to establish plaintiffs' title. *Taylor v. Carberrie*, 8 How. Pr. R. 885; *Bank of Louisville v. Edwards*, 11 *ibid.* 216; *Chappel v. Bissell*, 10 *ibid.* 274; *Mitchell v. Hyde*, 12 *ibid.* 480.

(2.) It alleges:—

1. Due presentment at maturity.
2. Non-payment.
3. Due notice of those facts to Hicks, as such indorser.

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This is sufficient to hold the indorser. *Speilman v. Weider*, 5 How. Pr. R. 5; *Chappel v. Bissell*, 10 ibid. 274; *Woodbury v. Sackrider*, 2 Abbott's Pr. R. 402; § 162, Code.

(8.) It alleges that the whole of said note is due, no part thereof having been paid. This is sufficient to admit evidence of that fact.

III. The complaint, stating a cause of action against defendant Ainslee, cannot be held bad on joint demurrer by both defendants, upon the ground that it does not state facts sufficient to constitute a cause of action. *Woodbury v. Sackrider*, 2 Abbott's Pr. R. 402.

INGRAHAM, FIRST JUDGE.—This is an appeal from an order granting judgment for the frivolousness of a demurrer.

It is objected that the judgment must first be entered before an appeal can be taken, but we have been in the practice of treating such appeals as properly from an order, and that to review it, we could do so as an order, and not as upon a judgment. There have been various and conflicting decisions on this point. I see no harm to arise from adhering to our former practice, and to the losing party the expense is less.

Whether or not the complaint is good, depends upon the answer to the question, whether it contains allegations of everything that the plaintiff would have to prove on the trial to sustain his action.

In such an action he must prove his possession or title, the signature of the makers and indorsers, the demand and notice of non-payment, and the amount due thereon for principal and interest. These facts would entitle the plaintiff to recover, and they are all averred in the complaint. It is not necessary for the plaintiff to aver that the payee delivered the note to him, under the present system of pleading. He is required to state the facts as they exist, and the old system of pleading which allowed the truth to be shown under a fictitious statement can no longer be required.

The cases referred to all assume that the allegation in the

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complaint, that the plaintiff is the lawful holder of the note, when denied, forms a material issue. The words used in this complaint are, that the note lawfully came into the possession of the plaintiffs *for value received*. This is equivalent to the other form of alleging title. The demurrer, admitting that the note came lawfully to the plaintiffs' possession for value received, admits thereby title.

We think the demurrer is frivolous, and that the complaint shows a good cause of action.

Order appealed from affirmed.

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**MICHAEL GARVEY v. THE CAMDEN AND AMBOY RAILROAD COMPANY.**

In an action against a common carrier, to recover the value of a trunk and contents entrusted to him by a passenger, it is not necessary to show a demand of the trunk and a refusal by the carrier to deliver before suit brought, where it appears on the trial that the trunk has been lost.

In such a case, proof of delivery and loss is *prima facie* sufficient to entitle the plaintiff to recover.

The cases reviewed wherein *formerly* a plaintiff was permitted to testify in support of his claim for lost baggage.

The provisions of the general railroad law of this state, passed in 1850, respecting actions for the recovery of lost baggage, do not apply to foreign corporations, but are limited to companies formed under that law.

**APPEAL** by defendants from a judgment of the First District Court.

The facts sufficiently appear in the opinion.

*Cambridge Livingston*, for the appellants.

*Monell, Willard and Anderson*, for the respondent.

**BRADY, J.**—This action was brought to recover the value of a trunk and contents, delivered to the defendants at the city of New York by the plaintiff, when he engaged a passage over

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their road to the city of Philadelphia. The proof of the delivery of the trunk and of its loss was sufficient *prima facie* to throw the burden of proof on the defendants to discharge them from liability. Miller, who was in their employment, states that he checked the trunk at the city of New York, gave the check, or certificate annexed to the return, to the plaintiff, and that the trunk was lost. This is the only testimony on these subjects, except that of the plaintiff, who was examined, the defendants objecting. The proof that the trunk was not delivered by the defendants would be insufficient, were it not for the statement of the defendants' servant that it was lost. That circumstance rendered its delivery impossible, and dispenses, in my opinion, with the necessity of any other evidence on that subject. A demand and refusal are only evidence of conversion, and may be rebutted by proof showing that a compliance with the demand was impossible. *Hill v. Covell*, 1 Comstock's R. 522. At all events, no motion to dismiss the complaint was made, upon the ground that no demand had been proved; and the objection taken on the appeal is not that there was no demand, but that there was not sufficient evidence to establish that the trunk was not delivered by the defendants. That it was lost, as appears by the testimony of the defendants' agent, answers that objection. The difficulties in the case, however, are presented by the examination of the plaintiff, to prove the contents of the trunk and their value.

An exception to the general rule, that a party cannot be a witness in his own behalf, is stated in Phillips on Evidence (Cow. & Hill's Notes), vol. 1, p. 70, and arose in an action against a hundred, on the statute of Winton, where a *party robbed* (the plaintiff) was allowed to prove the robbery and amount of loss, "from necessity, on default of other proof." 2 Roll. Abr. 686; Bull. N. P. 289; 1 Atk. 37, 38. See, also, 1 Greenleaf's Ev. § 348, and notes, where some of the cases on the subject are collated. Greenleaf states the rule to be, that "the oath in *litem* is admitted in two classes of cases: first, where it has been already proved that the party against whom it is offered has been guilty of some fraud or other tortious or unwarrantable act of intermeddling

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with the plaintiff's goods, and no other evidence can be had of the amount of damage ; and, secondly, where, on general grounds of public policy, it is deemed essential to the purposes of justice," citing Tait on Evidence, 280. But it would seem that the evidence was admitted *in odium spoliatoris*. *Anon.*, cited per Lord Keeper, in *East India Co. v. Evans* (1 Vern. 308), and except in the anonymous case, *coram Montague*, B. (12 Vin. Abr. 24, Witnesses, 1, pl. 34), only where fraud or tortious interference was established. In the latter case, which was against a common carrier, a question arose about things in a box, and Montague, B., declared that it was one of those cases where the party himself might be a witness *propter necessitatem rei*. The report of that case is not more definite than this statement of it, and no authority is mentioned showing an application of the rule in cases where fraud or violence was not shown. Whether it was so or not in that case, does not appear. In an action against an inn-keeper for money lost in his house, it was doubted whether the plaintiff was competent to prove the contents of the bag delivered to be kept for him (*Sneader v. Guess*, 1 Yeates, 34), though the court was *strongly inclined* to receive the evidence, on the authority of 12 Vin., *supra*. The plaintiff's evidence was received and its admissibility sustained in *Clark v. Spence*, 10 Watts (Pa.), 335 ; *McGill v. Howard*, 3 Barr (Pa.), 421 ; *David v. Moore*, 2 Watts & Serg. 230 ; *Whitsell v. Crane*, 8 Watts & Serg. 369 ; *Oppenheimer v. Elney*, 9 Humphrey (Tenn.) R. 393 ; *Johnson v. Stone*, 11 Humphrey, 419 ; *Herman v. Drinkwater*, 1 Greenl. (Me.), 27 ; *Mad River R. R. Co. v. Fulton*, 20 Ohio R. 318 ; *Pardoe v. Boston & Maine R. R. Co.*, 26 Maine, 458 ; and *Taylor v. Monnot*, 1 Abbott, 325. In *Herman v. Drinkwater* and *Oppenheimer v. Elney* there was a fraudulent appropriation by the carriers, but in the other cases the charge was of negligence merely. In *Span v. Wellman* (11 Mo. 286), the rule admitting the testimony of the plaintiff, in cases of negligence only, was discussed and doubted ; and in the case of *Snow v. The Eastern R. R. Co.* (12 Metcalf, 44), in which several of the cases above cited are reviewed, the court denied the application of the rule in cases of necessity.

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done, in the absence of fraud. And the court say in that case, among other things, "These cases proceed on the *criminal character* of the act and are limited in their nature. The present case does not fall within the principle. Here was no robbery—no taking away by the defendants—no fraud committed. It is simply a case of *negligence* on the part of the carriers,"—and then, expressing views deprecatory of admitting the plaintiff's oath in such cases, suggest that the plaintiff might protect himself by ordinary care from such losses; and refuse to "innovate the existing rules of evidence."

The question has not been adjudicated in this state, except in the case of *Taylor v. Monnot, supra*, although there are instances in which the admission of testimony *ex necessitate*, in the absence of fraud and where it could not have been an element, has been allowed in our courts. In *Caldwell v. Murphy* (1 Kern. 419), brought to recover for injuries by the upsetting of a stage, evidence of the plaintiff's complaint of his sufferings is said to be admissible from the necessity of the case, and not within the rule which excludes the declarations of a party in his own favor. The necessities presented in that case are by no means, it would seem, so extreme as the necessity here, inasmuch as the consequences of the plaintiff's injuries were, perhaps, within the reach of medical science, while in this case the proof objected to was not within the knowledge of any person other than the plaintiff. In *Clark v. Spence*, a distinction is drawn between articles of wearing apparel and merchandise; and it was said, in that case, "that a party can, under certain circumstances, be admitted to prove the contents of a box or trunk, must be admitted," and "that the rule applies with great force to wearing apparel, and to every article which is necessary or convenient to the traveller, which in most cases are packed by himself or his wife, and which, therefore, would admit of no other proof."

It may be said that the rule established by the cases referred to confines the evidence to such articles as are ordinarily carried in a trunk; that there are many considerations which will sustain the view of the question adopted in *Clark v. Spence*; and

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that the weight of authority appears to be in favor of extending the rule to all cases, whether of fraud, in which it originated as we have seen; or mere negligence; but I am not aware that in any case, except in *Snow v. The Eastern R. R. Co.*, and in *Span v. Wellman, supra*, the question, as an abstract principle of evidence, has been considered. It is true that there would seem to be great hardship in imposing upon a traveller the duty of having a witness always at hand, during his journey, to prove the contents of his trunk and the value of each article it contained, to meet an emergency to be occasioned by the carrier's neglect to perform his contract—thus requiring in the traveller extreme diligence and caution to protect himself from the neglect of his employee. There is little doubt that the carrier could secure himself from injustice in these cases, by such system of surveillance as he should consider best adapted to the end desired; and it may be said that there is no reason why he should be relieved from all caution in the performance of his duty. Perhaps, from motives of public policy, the rule might be extended to all cases of the carriage of wearing apparel, and such articles as are ordinarily carried in a trunk; but I think the reasoning and conclusion in the case of *Snow v. The Eastern R. R. Co.* are irresistible. The innovation of the rules of evidence, from necessity alone, would require constant changes in that science, to meet the emergencies of mankind in the multifarious transactions which are consummated without witnesses—the injured party in such cases having as many claims upon the administration of justice as the traveller who places his goods in the custody of the carrier. It would be a work of little labor to suggest many instances of necessity, in which the plaintiff would be excluded from sustaining his own demand; and the exception, if it be permitted at all, should be extended to every case where that necessity exists. Such is not the law of evidence, however, and the plaintiff is not permitted in any case to sustain his *claim* by his own testimony, except in actions similar to this, and which have, on the authorities named, been made exceptions. Considering the question, therefore, as an abstract rule of evidence, on

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the doctrine of necessity, the testimony admitted by the justice should have been excluded. Such evidence should not be received, except in cases where the carrier has been guilty of an unwarranted interference with the goods of the bailor, and then only in *odium spoliatoris*.

The plaintiff's case is not asserted by the statute of 1850, providing generally for the formation of railroad companies, and containing a provision allowing a plaintiff, in an action to recover baggage lost, to testify in his own favor. That provision does not apply to foreign corporations, and is limited to companies formed under the act of which it is a part. It is not a general act, and the doctrine of *lex loci* has no application to it.

Judgment reversed.

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JOHN RANDALL v. SAMUEL ALBURTIS, JR.

A refusal, by a landlord occupying premises in conjunction with his tenant, to permit an under-tenant of the tenant to occupy the premises demised, is an eviction by the landlord, and will prevent his recovery in an action against the tenant for the rent.

But the mere entry by the landlord upon his tenant's premises, unaccompanied by any attempt to exclude the tenant therefrom, does not constitute an eviction.

APPEAL by plaintiff from a judgment of the Fourth District Court. This was an action to recover rent. The plaintiff and the defendant occupied together the store No. 7 Broad street—the defendant hiring the front part of it from the plaintiff. A partition, running across the middle of the store, separated the shops of the plaintiff and the defendant, both being occupied as paint shops. The action was brought for the rent due for the quarter ending 1st November, 1856. The evidence showed that the defendant had left the demised premises some time prior to the expiration of the quarter; that after he had left them, the plaintiff made some use of them, and claimed an equal right to use

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them with the defendant; that the defendant, after having left them, leased them to one Jacob Fauenbecker, who was a boot and shoemaker, but that the plaintiff refused to allow him to occupy the premises for anything but a paint-shop. The justice rendered judgment for the defendant, and the plaintiff appealed.

*C. Patterson*, for the appellant. To constitute an eviction, the landlord must forcibly usurp and maintain possession of the demised premises. His mere entry therein is a trespass merely *Ogilvie v. Hall*, 5 Hill, 52; *Bushnell v. Lechmere*, 1 Lord Raymond, 369; *Hunt v. Cope*, 1 Cowp. 242; *Lansing v. Van Alstyne*, 2 Wend. 561.

¶ *W. B. Winterton*, for the respondent. An eviction consists in taking from the tenant some part of the demised premises of which he was in possession. *Etheridge v. Osborn*, 12 Wend. 529. A physical eviction or expulsion is not necessary. It is sufficient for the tenant to prove that there was an interference with or disturbance of his beneficial enjoyment of the demised premises by the landlord, intentionally committed and injurious in its character. *Dyett v. Pendleton*, 8 Cow. 727; *Lewis v. Payn*, 4 Wend. 426; *Ogilvie v. Hall*, 5 Hill, 52; *Cohen v. Dupont*, 1 Sand. S. C. R. 260, *per* Saundford, J.; *Lucky v. Frantzkee*, 1 E. D. Smith, 52, *per* Ingraham, F. J.; *Upton v. Townend, Same v. Greenlees*, 33 Eng. L. & Eq. R. 212. An eviction from a part of the demised premises discharges from the payment of the whole rent. *Lewis v. Payn*, 4 Wend. 426; *Lawrence v. French*, 25 Wend. 444; *Christopher v. Austen*, 1 Kern. 216; Taylor's Land. & Ten., p. 200, §§ 247, 379, 380.

**INGRAHAM, FIRST JUDGE.**—From all the evidence in the case, it is apparent that the plaintiff and defendant, in the occupation of the store, had a joint occupation rather than a divided one. The testimony shows that both of them were at different times in different parts of the premises, according to their convenience. The fact, then, of plaintiff's being in the front part of the

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store (which was the part nominally rented to the defendant) was not sufficient to show an eviction. He did not exclude, or attempt to exclude the defendant, but merely claimed a right with him in the store. At best, he was only a trespasser, and where that is the case, and a remedy exists for the trespass, the law does not favor calling it an eviction.

But although by itself such occupation jointly with the defendant is not sufficient proof of an eviction, yet taken in connection with the exclusion of the defendant's tenant, and the prevention of his occupation, I think, was enough to warrant the justice in finding that the plaintiff had resumed the possession and determined to exclude the defendant's tenant from the premises. Such an interference, under the cases, is an eviction. See *Burn v. Phelps*, 1 Starkie, N. P. R. 94, and *Lawrence v. French*, 25 Wend. 443.

There is a distinction between an interference by the landlord who sues for the rent, and by a landlord who interferes with a sub-tenant, owing rent to an intermediate landlord. In the latter case it is not an eviction. *Lawrence v. French*.

The plaintiff had no right to dictate, under the original letting to his tenant, what business should be pursued therein. It formed no part of the agreement, and, without such reservation, the tenant had a right to carry on what business he thought proper.

At any rate, the question was one for the court below, and the finding is conclusive.

Judgment affirmed.

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JAMES M. SMITH, JR., CYRUS CLEVELAND and AMERICUS V.  
POTTER v. HENRY R. SMELTZER.

A party who contracts to convey land is required to deliver a deed of conveyance of the property in such a condition as to make it *at once* operative to the purchaser against all persons.

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A vendor under contract to convey real estate, in order to put the vendee at fault, and maintain an action against him for damages for breach of contract, must show a tender of a sufficient deed, and a refusal to accept; although by the terms of the contract the vendor was to convey when the vendee was ready and tendered a compliance with the contract on his part.

A tender, at a time and place designated by the vendee, is sufficient.

But the tender of a deed, executed and acknowledged, is not sufficient if acknowledged in another state, or in a county other than that in which the property is situated, unless accompanied by such a certificate of the authority of the commissioner taking the acknowledgment as will entitle the deed to be recorded. The *onus* of procuring such certificate is on the vendor.

**APPEAL** by defendant from a judgment entered upon the report of a referee. This action was brought to recover damages for a breach of contract made between the parties to the action, by which the plaintiffs agreed to sell, and the defendant to purchase certain real estate, situated at Mamaroneck, Westchester county, New York. The complaint set forth the agreement, and then alleged that within the time set for performance by the agreement, and on a day appointed by the defendant, the plaintiffs went to the place of business of the defendant with a deed of the premises, for the purpose of tendering it, but that the defendant was not there, and thereafter refused to fulfil the agreement on his part, though often requested so to do. This the answer denied, though it did not deny that the place of the alleged tender was the defendant's place of business.

The cause was referred. Upon the trial before the referee it was proved that a deed was tendered, as alleged in the complaint, and the deed was produced by the plaintiffs, under a notice to produce given by the defendant. The deed was executed by all the plaintiffs and their respective wives. The plaintiff Potter and his wife were stated in the deed to be residents of Providence, Rhode Island, and their acknowledgment to the deed was taken there, by a commissioner for the state of New York in Rhode Island. The acknowledgment of the other two plaintiffs was taken, the one in Westchester county, and the other in the city and county of New York. No certificate of the secretary of state, authenticating the official character and signature of the

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commissioner, was attached to the deed; nor was there any county clerk's certificate in respect to the authority of the commissioner taking the acknowledgment in New York city. No objection was made to the introduction of the deed, but the defendant moved to dismiss the complaint upon several grounds, one of which was, that no sufficient tender of a deed to the defendant had been shown. The motion was denied, and at the close of the defendant's case, who offered some affirmative evidence on other points, the referee reported in favor of the plaintiffs. Judgment having been entered thereon, the defendant appealed.

*William D. Booth*, for the appellant.

*E. A. Doolittle*, for the respondents.

**INGRAHAM, FIRST JUDGE.**—A motion for a nonsuit was made in the present case, upon the ground that the plaintiffs failed to show that they had tendered a proper deed, and that the place of tender was not the place of business of the defendant.

In regard to the latter point, it is sufficient to say that the complaint avers that the deed was tendered at the place designated and appointed by the defendant. This is not denied in the answer, and is therefore conclusive. *Franchot v. Leach*, 5 Cowen, 506.

The denial of a tender of a proper deed rests upon the supposed defect in the description of the premises, and in the mode of execution.

The deed was acknowledged by two of the parties before a commissioner for the state of New York residing in Rhode Island, and there was not attached to the deed any certificate of the secretary of state so as to permit it to be recorded.

The same objection also existed to an acknowledgment of two other parties before a commissioner of deeds of the city and county of New York.

The deed could not have been recorded without obtaining a

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certificate from the clerk of the city and county of New York, as to the one, and from the secretary of state as to the other.

The validity of this objection depends upon the decision as to which of the parties was under the necessity of procuring the certificates.

It appears to me, that without such certificates the conveyance was not perfect. It is true that either party could have procured the same, but until procured the deed could not be recorded, and in the time which would be required to obtain them, other conveyances or incumbrances might be put on record, so as to entirely defeat the purchase. The certificates are as necessary as the acknowledgment, and without them the deed, although valid against the grantor, would be of no force or effect against an innocent purchaser or subsequent incumbrancer. It can never be maintained that a party, who contracts to convey land in New York, may execute a deed in a foreign country, or another state, and deliver such deed in an imperfect condition. A party who has to deliver a deed of land, in pursuance of a contract, is required to deliver it in such a condition as to make it at once operative to the purchaser against all parties. Such is not the case where the deed cannot be recorded, and the purchaser is put to delay and expense to complete the same. If the deed had been executed where the land to be sold was located, such certificates would have been unnecessary; but where the vendor for his convenience executes it elsewhere, he must provide all that is necessary in consequence of such execution, so that it may be recorded where the land lies. It is said that the objection should have been taken to the reading of the deed before the referee, but such an objection cannot be taken to the deed when produced on the call of the opposite party, and the production was necessary to show that the deed was defective.

It is also said that the plaintiffs were not bound to tender a deed, because, by the contract, the plaintiffs were only to convey as soon as the defendant was ready, and tendered a compliance on his part. This is so, if the defendant sought to put the plaintiffs in default. But the contracts were not independent, so that

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the plaintiffs could claim damages, without, on their part, first offering a conveyance. They were required to tender the deed, in order to put the defendant in the wrong, and not having tendered a sufficient deed, I think they cannot recover in this action.

It is not necessary to examine the other questions discussed on this appeal, as the judgment cannot be sustained, for the reasons above mentioned.

Judgment reversed, and case sent back to the referee, costs to abide event.

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EDWARD M. MASON v. THOMAS J. CAMPBELL.

It is too late to demand a jury in a district court, upon a day to which the cause has been adjourned after joining of issue.

A defendant cannot object to the regularity of adjournments made by his consent, or upon his motion. His consent is a waiver of the irregularity.

APPEAL by defendant from a judgment of the Third District Court. The cause was commenced in April, 1856, and was adjourned from time to time, by consent of the parties, until the first of September, when the cause was tried, and judgment was rendered for the plaintiff. The facts upon which the appeal of the defendant was based are fully stated in the opinion of the court.

*Clark and Cornwall*, for the appellant.

*John T. Brown*, for the respondent.

INGRAHAM, FIRST JUDGE.—Upon the return of the summons in this case, the parties joined issue, and adjourned the cause to another day. On appearing at the adjourned day, the defendant demanded a jury, to which the plaintiff objected. A jury was

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ordered by the justice, and the case adjourned. Numerous adjournments afterwards were made, on the motion of the defendant or with his assent, until the 8d of June, when the defendant did not appear. On that day the plaintiff commenced taking an inquest, and the case was held by the justice for advisement. On the next day, the defendant again appeared, and by consent the trial was opened and continued by several adjournments, until the 1st of September, when the case was again submitted, and the justice rendered judgment for the plaintiff.

The defendant was not entitled to a jury when he demanded it. Issue had been joined, and the case adjourned to another day, and on the adjourned day the demand for a jury was made. This was too late. The act of January 4, 1820, section 3, limits the right to a demand of a jury to the day on which issue is joined, when it says, "it shall not be lawful for either of the parties to demand a jury after the day in which an order has been made for an adjournment." In *Shannon v. Kennedy*, 1 E. D. Smith, 345, a doubt was expressed whether such demand could be made on the same day after it was adjourned, but it was not intended to express any doubt whether it could be done on a subsequent day. The statute is positive in prohibiting it.

The subsequent adjournments were all made with defendant's consent or on his motion. He cannot object to the irregularity. His consent waives it. *Redfield v. Florence*, 2 E. D. Smith, 339.

Judgment affirmed.

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JOSEPH W. TRUST v. JAMES PIRSSON and others.

A lien exists either by the express agreement of the parties, or is implied from their mode of dealing, or it follows from the established usage of trade, or it is founded upon the immemorial recognition by the common law of a right to it in special cases.

It seems the lien is recognized in the case of every bailee for hire who takes property in the way of his trade and occupation, and by his labor and skill imparts additional value to it.

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If a special agreement for a particular mode of payment, or for payment at a future period, is made in any case in which a right of lien would otherwise be implied, the lien does not exist. If such an agreement is made before the claimant acquires possession of the chattel no lien is created, if made thereafter it is a waiver of the lien.

By agreement between P. and T., P. was to have the right to store, repair and sell piano fortés in T.'s store, for which privilege he was to pay \$25.00 per month at the expiration of each month.

*Held*, that T. had no lien on the piano fortés for the amount due under this agreement.

An action having been brought upon this agreement to recover a balance claimed to be due thereon, and to enforce a lien therefor, and a verdict having been rendered for the plaintiff for \$1.

*Held*, that the action was one for the recovery of money only, and the defendant was entitled to costs.

The proper mode of enforcing a common law lien against chattels discussed. *By* BRADY, J.

APPEAL by plaintiff from an order at special term awarding costs to defendants. This was an action to recover the sum of \$52 due for storage, &c., and to enforce a lien on certain piano fortés therefor. In November, 1854, an agreement was made between the plaintiff and the defendant Pirsson, by the execution of the two following writings, the one executed by Pirsson to Trust, and the other by Trust to Pirsson.

“I hereby agree to pay Joseph W. Trust twenty-five dollars per month, for the privilege of stowing in his store, No. 65 Walker street, piano fortés, with the right of repairing piano fortés in said store, from the date herein mentioned, to the first day of May, 1855.

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“New York, November, 5th, 1854.

“(Signed)

JAMES PIRSSON.”

“New York, November 6th, 1854.—I hereby agree to allow Mr. James Pirsson to store in my store, No. 65 Walker street, piano fortés, and to repair piano fortés, and to sell piano fortés, in my store, for twenty-five dollars per month, to be paid monthly; nothing in this agreement is to be construed into a let-

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ting of said store to said Pirsson; the said amount of twenty-five dollars is to be paid at the expiration of each month, and this agreement to remain in force until the first of May, 1855.

“(Signed)

J. W. TRUST.”

The complaint averred that there was due the plaintiff, from the defendant Pirsson, the sum of fifty-two dollars under this agreement; that the defendant had wrongfully and forcibly entered the plaintiff's store, and removed the piano fortés after the plaintiff had locked them up, for the purpose of securing the lien which he claimed to have upon them, and the complaint prayed that the piano fortés might be sold, and the amount of the plaintiff's claim be paid out of the proceeds. Ferdinand G. Light, Henry J. Newton and Edward G. Bradbury were joined as defendants, upon the allegation that they had, or claimed to have, some interest in the piano fortés. The defendant Pirsson's answer contained an allegation that the plaintiff had locked up the piano fortés which were in his store, and wrongfully detained them from his possession, and claimed damages therefor. The cause was tried before a jury. They allowed the defendant's counter-claim, and assessed his damages at thirty-nine dollars. They also found that forty dollars was due the plaintiff, under the contract, and they rendered a verdict in his favor for the balance of one dollar. The defendants, on this state of facts, moved, at special term, for an order allowing them costs. This order was granted. The following is the opinion of Judge Brady, before whom the motion was heard.

BRADY, J.—This action was brought to enforce a lien for the storage of pianos, that had been wrongfully taken from the plaintiff, after his lien had attached, and the complaint prays for judgment against the defendants; that the piano fortés be sold, and that fifty-two dollars (the amount of the lien) be paid to the plaintiff, from the proceeds, together with interest, from March 19, 1855, and the costs of the action, and that he have such other and further relief as may be just. The verdict rendered by the jury, impanelled to try the issues presented on the pleadings,

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found the counter-claim set up to be \$39, and the claim of the plaintiff to be \$40, and thus giving the plaintiff judgment for \$1. On this state of facts, and on the pleadings, the defendants ask for costs, and the plaintiff insists that the action being equitable in its nature, the costs are, under section 906, at the discretion of the court. It is said in *Fox v. McGregor* (11 Barb. 41), that an innkeeper's remedy, to enforce a lien for keeping the horse of his guest, is by action in the nature of a bill in chancery, the court citing 1 Cow. Tr. (2d ed.) 299. On examination of the book referred to, it is said to be "supposed that the only way in which satisfaction from a lien can be enforced, is by a lien in chancery," referring to 1 Strange, 556; 1 Holt N. P. R. 583; 2 Kent. Com. (3d ed.) 642, and other cases cited. And we find, on examination of Edwards on Bailments, 414, the statement of the same principle in reference to innkeeper's lien, with a reference to the cases just stated, also *Fox v. McGregor*, *supra*, and 8 Mod. R. 172. Upon examination of 2 Kent, we find the contents to be, "I presume that satisfaction of a lien may be enforced by a bill in chancery," without referring to any authority, and leaving the subject upon the opinion of the author only. With due deference to the learned author of Cowen's Treatise, I assert that the authorities referred to on this point have no bearing upon the principle stated by him in the context, and that they relate to actions of trover in which the doctrine of equity power or jurisdiction is not suggested. Where the lien existed, and the remedy at law was inadequate, I have no doubt the Court of Chancery had the power to enforce any right, but I deny that, on the authorities referred to, such a proceeding as suggested could be sustained, and certainly not in any case, unless the matter in dispute, exclusive of costs, exceeded the value of \$100. 1 Barbour Ch. Pr. 39; 2 R. S. 173, § 49 (orig. § 37). In this case, the value of the property was not proved on the trial, and was not passed upon by the jury; if it had been, then we should be met by the difficulty that the equitable remedy to enforce the lien is predicated upon the possession of the property by the lienor,

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and not where he has parted with it, or it has been violently taken from his custody. Voluntarily yielding possession is a waiver of the lien. 1 East, 4; 26 Wend. § 67; 2 Kent (7th ed.) 810; 3 Hill, 435. But where the chattel or thing to which the lien has been attached is tortiously taken from the lienor, he may maintain replevin to recover it and enforce his lien. *Bigelow v. Heaton*, 6 Hill, 43. The complaint, here, does not ask the possession of the property affected by the lien, but for a judgment for \$52 against the defendant, and a sale of that property to satisfy that judgment. There is no proof in the case from which the particular property designated could be described, if such a judgment could be rendered, and the property itself is neither in the possession of the court, or officer appointed by it, nor of the plaintiff. Although the nature of the claim may be equitable, the action is one to recover a sum of money, and on the proof and the finding of the jury, no judgment other than a judgment for the recovery of money can be entered. In these views of this application, it seems to me conclusive, that the defendants are entitled to their costs. I admit that the questions presented are new and embarrassing, but I think, aside from the exact character of this action, there was no necessity for an "equity" action contemplated by section 306. But if there was, and this action was so designed, the facts proved do not place it within that jurisdiction. The defendants' costs ordered, and judgment for plaintiff for \$1.

From the order entered in accordance with this opinion, the plaintiff appealed.

*Banks and Anderson*, for the appellant.

*A. M. Culver*, for the respondents.

**DALY, J.**—The chief difficulty in this case—that is, whether the plaintiff had any lien at all—does not appear to have been considered upon the trial, nor upon the submission of this appeal. That he had no lien is very clear. A lien at common law and

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in equity is a right to retain and possess a thing until some charge upon it is paid and removed (2 Story Eq. Jur. § 1216), and as far as it relates to personal property, it depends less upon any general principle than upon the usage of trade, or the recognition of a right to it, in particular instances. *Kruger v. Wilcox*, 1 Amb. 253, and note, 2 ed.; *Green v. Farmer*, 4 Bur. 2221. Thus a wharfinger or warehouseman has a lien, by established commercial usage, upon the goods deposited with him, for his charges. *Rex v. Humphrey*, McClel. & Y. 173; *Boardman v. Sill*, in note to *Attersoll v. Briant*, 1 Camp. 409; *Naylor v. Mangles*, 1 Esp. 109; *Schmidt v. Blood*, 9 Wend. 270. While the finder of a chattel has no lien for the expense he may have been at in taking care of it for the owner. *Nicholson v. Chapman*, 2 H. Black. 254. Nor has an agistor upon the cattle he depastures (*Jackson v. Cummins*, 5 Mees. & Welsb. 342); nor a stablekeeper for the keep of a horse (*Wallace v. Woodgate*, 1 C. & P. 575); though the natural equity in favor of allowing this kind of security in the three latter cases is quite as great as in the former.

A lien exists either by the express agreement of the parties or it is implied from their mode of dealing, or it follows from the established usage of trade, or it is founded upon the immemorial recognition, by the common law, of a right to it, in special cases, as in the case of carriers, innkeepers, and farriers, who are bound to receive employment when offered to them in their particular calling, and who are liable to an action if they refuse. *York v. Greenough*, 2 Ld. Ray. 866; *Parkhurst v. Foster*, 1 Salk. 388; *Lane v. Cotton*, 12 Mod. 484. And in the case of tailors, *Cooper v. Andrews*, Hob. 42; and of dyers, *Green v. Farmer*, *supra*; which has led to the recognition of it in the case of every bailee for hire who takes property in the way of his trade and occupation, and by his labor and skill imparts additional value to it. *Bevan v. Winters*, Mo. & M. 235; *Scharf v. Morgan*, 4 Mees. & Welsb. 283; *Grimel v. Cook*, 3 Hill, 491.

But if, in any case where the right to a lien would be recognized or implied, the parties make a special agreement for a particular mode of payment, or for payment at a particular time or

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period, the right of lien, which would otherwise be implied, does not exist. *Chase v. Westmore*, 5 M. & S. 180; *Cowell v. Simpson*, 16 Ves. 275; *Walker v. Birch*, 6 T. R. 258; *Chandler v. Belden*, 18 Johns. R. 157; *Woolen Manufactory v. Hunley*, 8 New Hamp. 441; *Cumming v. Harris*, 3 Verm. 244. If the agreement is antecedent to the possession, no lien is created; if it is made afterwards, it is a waiver of the lien. Indeed, it was long doubted whether any lien could exist where the parties specially agreed as to the price (*Brennen v. Currin*, Sayre, 224; *Yelv.* 67, note); but upon a full examination of the early authorities in *Chase v. Westmore*, *supra*, this was repudiated, and it was shown that the rule, to be extracted from the year books, intended no further than to deny the right of lien where a future time of payment was fixed by the parties.

The agreement of the parties in this case is contained in two instruments, one signed by the plaintiff and the other by the defendant Pirsson; and, taken together, they show that Pirsson was to have the right to store, to repair, and to sell piano fortés in the plaintiff's store, for which privilege he was to pay \$25 a month, to be paid at the expiration of each month, and the agreement was to continue in force from the time of its date, Nov. 6 1854, until the 1st of May following. This was, in substance, an agreement to use the store for six months for a particular purpose, and is very distinguishable from a contract with a warehouseman, the only character in which the plaintiff could claim to have a lien upon the pianos under this agreement.

Goods are deposited with a warehouseman for safe keeping. He has the custody of them, and, in the safe keeping of them, is bound to ordinary care and diligence, being liable if they are injured, while in his care, through his negligence; and he is generally understood to be one who carries on a public business of receiving goods into his custody, or under his care, for reward. *Thomas v. Day*, 3 Esp. 262; *Platt v. Hibbard*, 7 Cow. 500, and note a. And even a warehouseman's right to a lien has been doubted (*Rex v. Humphrey*, *supra*); or, if upheld at all, it can only be by established commercial usage, which was offered to

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be proved in *Schmidt v. Blood, supra*. But no such employment as this arose, or is contemplated by this contract. Pirsson was not merely to have his pianos stored, but he was to have the use of the plaintiff's store for the repairing and sale of his pianos for a definite period. By the contract it was provided, that it was not to be construed into a letting of the store—that is, Pirsson was not to have the exclusive possession, but the use of it, and a possession in common with the plaintiff, for the purpose specified. This was very different from an agreement with a warehouseman for the storing of goods.

But even if it could be treated as a contract of that description, the agreement for the payment of \$25, at the expiration of each month during the period the agreement was to continue, was wholly inconsistent with the retention of the right of lien. The authorities cited are conclusive on this point. In *Woolen Manufactory v. Huniley, supra*, the defendant was to dress what flannel should be sent to him during a year, and to receive his pay quarterly, and it was held that he had no lien. The distinction, that there can be no lien where the day or time for payment is regulated and fixed by the parties, is as old as the year books, and it is manifest that the law could not be otherwise. The right to detain all the property to which the lien attaches, until the charge upon it is paid, is incident to the right of lien. When, then, did the lien in this case attach? Certainly not when the possession commenced, for no payment was to be made until a month after. During that time Pirsson had a right, under the agreement, to sell any of his pianos that might be there, and of course to deliver them to the buyers, for the plaintiff could set up no claim to action then, nothing being due. The contract, therefore, went into operation with a recognition of rights on the part of Pirsson wholly inconsistent with a reservation of a right of lien. It was nothing else but an agreement for the use of the store for a certain period, at so much per month, for the prosecution of a particular business by Pirsson, and gave the plaintiff no lien upon the property which Pirsson had there in the prosecution of that business, but, by its nature and

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terms, was wholly inconsistent with the existence of such a right.

The existence of a lien was directly put in issue by the answer; and if the plaintiff could maintain his action at all in the form in which he brought it, it could only be for money due under the contract for the use of the store. Having obtained a verdict, we must intend, having nothing before us on this motion but the pleading and the judgment, that the jury found in accordance with the law; that he recovered what he was entitled to by the terms of the contract—that is, \$40, against which they allowed a counter-claim of \$39, for an unlawful interference with and partial or temporary deprivation of the possession, which they had a right to do. *Drake v. Cockcroft*, 1 Abbott, 208. The action, therefore, being for the recovery of money, and having recovered less than \$50, the defendants were entitled to costs, and the order at the special term should be affirmed.

In the view I have taken of this case, it has become necessary to pass upon the questions which have been discussed upon the appeal, and which were assigned as the ground for the decision made by Judge Brady at the special term.

Order at special term affirmed.

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#### WILLIAM WISEMAN v. THE PANAMA R. R. COMPANY.

The failure of the justice of a district court to give judgment within four days after the cause is submitted to him, deprives him of jurisdiction and renders the judgment a nullity.

Whether the consent of the parties to the cause, extending the time for giving judgment, relieves the difficulty, *quare?*

No action can be maintained for work and labor, unless the work has been actually performed. Where a party has been employed under a contract and wrongfully discharged, his remedy is either by an action for damages for breach of contract, or for the contract price. In the former case, one recovery would be a bar to any

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further action. In the latter, it must appear that he was ready and willing to perform any further services that might be required under the contract.

APPEAL by defendants from a judgment of the Third District Court. This action was brought to recover for work and labor performed by the plaintiff for the defendants. Judgment was rendered for the plaintiff for \$100. The facts are stated in the opinion of the court.

*Eaton and Davis, for the appellants.*

*J. G. Brady, for the respondent.*

INGRAHAM, FIRST JUDGE.—This action was tried before the justice on the 26th September, and the judgment was not rendered until the 6th October, being ten days between the judgment and the trial. By the statute, the justice is required to render judgment within four days. 2 R. L. p. 370, § 87. This delay beyond the four days has been repeatedly held to deprive the justice of jurisdiction, and the judgment is therefore a nullity. *Watson v. Davis*, 19 Wend. 371. And we have repeatedly so held in this court.

The justice returns that it was agreed by the attorneys that judgment should be entered within six days. Without inquiring whether such a consent would give the justice jurisdiction, and conceding that the stipulation would have such an effect, still it does not relieve the difficulty. Six days from the judgment, expired on the second day of October, and the judgment was not rendered until four days thereafter. I think the judgment on that account must be reversed.

There are other difficulties in this case, which are also fatal. The claim is for work and labor. The evidence shows, that for all the time the plaintiff did any work he was paid, and that he was discharged by the defendants' agent; within nine days thereafter he left the Isthmus and returned to New York, and the judgment is for one hundred dollars.

If the plaintiff was entitled to recover, it was for a breach of contract in not employing the plaintiff, and not for work and

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labor which he never performed. His action should be for the damages; and, in such a case, one recovery would be for all the plaintiff could recover. If he could recover for thirty-three days' work and labor, he might bring another action for further wages coming due thereafter, while from all the evidence it appears he was not ready or willing to perform any further services. Upon this ground also the justice erred.

Judgment reversed. \*

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**ROBERT J. WILDE v. THE NEW YORK AND HARLEM RAIL-ROAD COMPANY.**

An action may be commenced in a district or justice's court against a resident corporation by a short summons, when the plaintiff is a non-resident and furnishes the requisite bond and affidavit.

This court cannot relieve a defendant, under § 366 of the Code, from a judgment taken by default in a district court, if he has once appeared in the action.

APPEAL by defendants from a judgment of the Second District Court. This action was commenced by a short summons, the plaintiff being a non-resident and giving security. On the return day the defendants appeared, and moved to dismiss the suit upon the ground that the defendants could only be sued by a long summons. The objection was overruled, the defendants answered, and the cause was thereafter twice adjourned. On the final adjourned day the defendants failed to appear, and judgment was rendered against them by default. From that judgment they appealed, and on the appeal offered affidavits showing a defence upon the merits and an excuse of their default.

*Odele Close*, for the appellants.

I. The justice erred in denying the motion of defendants to dismiss the suit or quash the summons, on the ground that a short summons is not proper process against a corporation. 11 Barbour, 621; 15 ibid. 630.

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Wilde v. The New York and Harlem R. R. Co.

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II. The error of the justice was not waived by defendants. 11 Barbour, 309; 17 Wend. 85, 87.

III. The defendants having excused their default, and manifest injustice having been done them by depriving them of the cross-examination of plaintiff's witnesses and the examination of their own witnesses, the court ought to grant a new trial. Code, § 366; 18 Barb. 387.

*Stillwell and Swain*, for the respondent.

BRADY, J.—The Code, section 53, confers civil jurisdiction in certain actions, of which the present is one; and section 54 declares that no justice of the peace shall have cognizance of a civil action in certain cases, not including, however, actions against corporations. The constitution, sect. 3 of art. 8, declares that corporations shall have the right to sue and shall be subject to be sued in all courts, in like cases as natural persons. There can be no doubt that an action can be entertained by a justice against a resident corporation, and, as we shall see, that such corporation may be sued, by a non-resident plaintiff, by short summons. The 32d section of the act abolishing imprisonment for debt (Session Laws, 1831, p. 403) provides, that whenever, by the provisions of section 31 of that act, no warrant can issue (and in this action no warrant could issue against the defendants), and the plaintiff shall be a non-resident of the county, and shall give like proof of the fact, and shall give the security required by law, the justice shall issue a summons, which may be made returnable not less than two or more than four days from the date thereof, and shall be served, &c. In this case the plaintiff was a non resident, and complied with the statute on obtaining the summons, and the court below acquired jurisdiction of the cause. This disposes of the objections to the validity of the plaintiff's judgment.

We have frequently held that we cannot grant any relief under section 366 of the Code of Procedure, where the defendant has appeared, although the judgment be afterwards taken by de-

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O'Brien v. Brietenbach.

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fault. *Bunker v. Latson*, 1 E. D. Smith, 410; *Frost v. Hanmer*, May Term, 1856; *Gurridge v. Slingerland*, Feb. Term, 1856. Judgment affirmed.

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#### BRIDGET O'BRIEN v. SAMUEL BRIETENBACH.

In an action by lessee against lessor to recover damages for refusal to give possession of the demised premises, it is no defence that the plaintiff hired the premises intending to keep a house of prostitution therein.

The mere avowal of an intent of the lessee to employ the leased property in the prosecution of an unlawful business does not constitute an offence, nor does it entitle the lessor to repudiate his contract.

APPEAL from an order at special term, striking out a part of defendant's answer as irrelevant.

This action was brought to recover damages for defendant's alleged refusal to give plaintiff possession of a portion of premises at No. 245 Canal street, in the city of New York, leased to plaintiff by the defendant.

The answer contained a paragraph as follows: "And the defendant, for a distinct and separate answer, says, that if the plaintiff hired any rooms of the defendant at No. 245 Canal street, she hired the same with the intent and meaning at the time of hiring, and ever since so intending, to keep therein a common and public house of prostitution."

The plaintiff moved to strike this paragraph from the answer, as irrelevant. The motion was granted, and the defendant appealed.

*A. L. Pinney*, for the appellant.

*O. P. Johnston*, for the respondent.

BRADY, J.—The matter objected to was properly stricken from the answer. The intention of the plaintiff, publicly avowed, to keep a bawdy house, was no reason why she should be pro-

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Gilsey v. Wild.

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hibited from occupying the premises rented. The defendant, her landlord, was not privy to any such intent or arrangement, and it therefore formed no part of the contract. The contract itself was not *contra bonos mores*, and although the plaintiff may have intended a violation of law by keeping a bawdy house, the mere intent itself neither constituted an offence nor gave to the defendant a right to repudiate his contract for that reason. If, after taking possession, she was guilty of the acts contemplated, the statute against disorderly houses would protect the defendant and remedy the evil.

Order appealed from affirmed.

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#### JOHN GILSEY v. HORATIO N. WILD.

An agreement to pay the plaintiff a specified sum if he would hire certain premises for a year, to commence on a future day, at a certain rent, and to be occupied for a specified purpose, is not an agreement which cannot be completed within one year, and which must be reduced to writing, under the statute of frauds, to make it obligatory.

Such an agreement is completed on the part of plaintiff when he has hired the premises and assumed the responsibility of paying the rent, pursuant to the request of the defendant.

APPEAL from a judgment of the Fourth District Court. The complaint in this action averred, that on the 18th day of March, 1855, the plaintiff, a segar dealer, was occupying the store No. 439 Broadway, at the yearly rent of \$1,500; that he was about to leave at the close of the then current year, in consequence of the rent being raised to \$1,600; that the defendant being then engaged in manufacturing and selling candies at a store very near to that occupied by plaintiff, and believing that if plaintiff surrendered the premises they would be hired for the purpose of a candy store in competition with that of defendant, agreed with plaintiff that if he would hire the store for another year from May 1st, then approaching, for a segar store, at the rent demanded, he, the defendant, would pay him one hundred dollars.

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The defendant demurred to the complaint, contending that it should show a memorandum in writing of the promise sued upon. The justice overruled the demurrer.

The plaintiff then proved a verbal promise, as alleged in the complaint. The defendant moved for a nonsuit, which was denied.

Judgment was rendered for the plaintiff, from which defendant appealed.

*J. M. Ackley*, for the appellant, contended that the agreement was one which, by its terms, was not to be performed within one year from the making thereof, and was therefore void, unless evidenced by a memorandum in writing. 2 R. S., 4th ed., p. 317. The agreement was made on the 18th of March, 1855, and could not be fully and completely performed until the 1st of May, 1856. The consideration for defendant's promise was, that the plaintiff should hire and occupy the store as a segar store for one year, for the purpose of keeping it from being occupied by a person in the same business as defendant. Unless, therefore, plaintiff had hired and occupied the store during the entire year, he could recover nothing. Agreements which could not be completely performed on both sides within a year were within the statute. *Wilson v. Martin*, 1 Denio, 602; *Broadwell v. German*, 2 ibid. 87; *Spencer v. Halsted*, ibid. 606; *Lockwood v. Barnes*, 3 Hill, 128.

*N. A. Chedsey*, for the respondent.

**BRADY, J.**—The defendant promised to pay the plaintiff \$100, if he would hire the part of the premises 439 Broadway for one year from May 1st, 1855, at a rental of \$1,600, then occupied by plaintiff. The avowed object of the defendant, in thus inducing the plaintiff to take the premises again, was to keep a Mr. Kane out of them, whose business was similar to the defendant's, and whose proximity would be injurious. The plaintiff consented, and hired the premises. The complaint sets up these facts in detail, and, as they constitute a cause of action, the demurrer was

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properly overruled by the justice. The statute of frauds has no application to them. The plaintiff's right of action was complete when he hired the premises, as requested. He had assumed the responsibility of paying the rent, in accordance with the request and upon the inducement of the defendant. The assumption of a supposed liability, which has no foundation in law or in fact, is not a sufficient consideration (*Cabot v. Haskins*, 3 Pick. 83); but that the assumption of an actual liability is, cannot be questioned. The acceptance of the contract by the plaintiff, and the execution of it in part, created an obligation on his part to pay the rent; and the thing done is a sufficient and completed consideration. The defendant was to pay \$100 if the plaintiff assumed to pay \$1,600, and the plaintiff assumed the payment. See *Phelps v. Townsend*, 8 Pick. 392. Whether the consideration of the defendant's promise was adequate or inadequate, makes no difference. The slightest consideration is sufficient to sustain the promise. *Oakley v. Boaman*, 21 Wend. 588.

Judgment affirmed.

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WILSON SMALL v. PETER G. LUDLOW and others.(a)

The argument of a demurrer, on which a final judgment is rendered, is a trial, and the successful party may have an extra allowance where the case is difficult or extraordinary.

But this rule does not apply to a decision upon a demurrer noticed as frivolous and so adjudged.

APPEAL by defendants from an order denying a motion for an extra allowance. In this case the defendants demurred to the complaint. The demurrer was sustained, and judgment ordered for the defendants, with leave to the plaintiff to amend. From this order the plaintiff appealed, and it was affirmed on

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(a) See *ante*, p. 189.

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appeal.(a) The defendants then moved for an extra allowance. The motion was denied. The judge denying the motion granted a certificate, giving the defendants leave to appeal, under a rule of this court, adopted March 22d, 1854, and the defendants appealed accordingly.

*Schell, Slosson and Hutchins*, for the appellants.

*A. C. Morris*, for the respondent.

DALY, J.—The argument of a demurrer on which a judgment is rendered, which is a final disposition of the action, is a trial. ~~or~~ trial is a judicial examination of the issues between the parties, whether of law or fact. § 252. A demurrer involves an examination and decision of the issues, and where it is followed by a judgment, which disposes of the case, the argument must be regarded as a trial. An argument upon a demurrer, noticed as frivolous, is not a trial, because if the judge does not see that the demurrer is frivolous, he makes no decision upon the issues. *Rochester Bank v. Rupelje*, 12 How. 26. It is merely a motion to get rid of a frivolous pleading. *Gould v. Carpenter*, 7 ibid. 97. But a demurrer not frivolous raises an issue of law, and the argument of it is the trial of an issue of law. *Hendricks v. Buck*, 2 Abbott, 360. There may be some doubt, perhaps, whether it may be regarded as a trial, where liberty is given to amend. But in this case the plaintiff did not avail himself of that liberty, but appealed to the general term, and the defendant had judgment. It must, therefore, be regarded as a trial, and the case was one entitling the defendant to an extra allowance.

Order appealed from reversed, and an extra allowance granted.

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(a) See decision reported ante, page 189.

## THOMAS MURPHY v. WILLIAM LONG.

The general term of the Marine Court has no power, on appeal from a judgment, to make an absolute order that it be modified by increasing the amount.

Where, however, a judgment appealed from is palpably too small in amount, an order may be made directing that there be a new trial, unless the defendant consents to a specified increase.

APPEAL from a judgment of the general term of the Marine Court. The facts appear in the opinion of the court.

*F. Cahill*, for the appellant.

*P. Callaghan*, for the respondent.

BRADY, J.—The justice, at the special term of the Marine Court, rendered judgment for the plaintiff for \$137.33, and \$12 allowance. The plaintiff appealed from the judgment thereon entered to the general term of that court, and, after hearing the respective counsel for the parties, the general term made an order that the judgment be so modified that the plaintiff recover of the defendant \$209.88, together with \$19.25—in all \$229.13, and that said judgment be entered as of the 29th day of January, 1856.

The general term exercised, in thus increasing the judgment, a power not possessed by it, and never exercised by courts in *banc* in England or this state. Sometimes, where the verdict or finding is palpably too small, the court has ordered an increase of the judgment, if the defendant consented, to avoid the necessity and expense of another trial (see *Richards v. Sandford*, 2 E. D. Smith, 349), but not otherwise. The general term of the Marine Court might have directed a new trial, unless the defendant consented to the increase of the judgment, beyond that they had no jurisdiction. The language of the order of the general term is, that the judgment be modified, which could not be accomplished by increasing the judgment.

Judgment reversed.

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Loftus v. Clark.

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MICHAEL LOFTUS, assignee of William Scotsmer, *v.* WILLIAM T. CLARK and DAVID DEANE.

A written instrument for the payment of money upon a contingency, may be transferred by delivery merely, although drawn payable "to order."

Such an instrument is not negotiable, and no indorsement is requisite to transfer the title. A delivery, with intent to vest in the party claiming under it all the payee's interest in it, is sufficient.

The act of March 26, 1818, prohibiting justices' courts from exercising jurisdiction in actions for seamen's wages, deprives the justice of jurisdiction, only when the action is against the owners, master or commander of a ship or vessel upon a contract made with the owners, commander or master.

The prohibition does not apply to an action on a contract of a shipping agent to pay advance wages on the seaman's proceeding to sea in the vessel, pursuant to the shipping articles.

APPEAL from a judgment of the Second District Court. The action was brought to recover upon an instrument in the following form.

"New York, Nov. 15, 1856.

"We promise to pay William Scotsmer or order, forty dollars, being the amount of his advance wages in the ship called the Arabia, provided he proceeds to sea in said vessel according to the shipping articles.

"(\$40.)

CLARK & DEANE, 183 South street  
"Per JOHN WILSON."

It appeared that defendants kept a shipping office, and were engaged in the business of shipping seamen. Scotsmer was a seaman, and was boarding with the plaintiff, who kept a sailors' boarding-house. He shipped for the Arabia, at Clark & Deane's office, and received the above due bill for advance wages, and afterwards delivered it to the plaintiff on settling accounts with him for board. There was evidence that Scotsmer had gone on board the ship to sail in her.

On the trial, after the evidence for the plaintiff was closed,

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defendants' counsel moved for a nonsuit on the ground that there was an indorsement of the instrument in suit by Scotsmer to the plaintiff. The motion was denied. The justice rendered judgment for the plaintiff, and the defendants appealed. The notice of appeal stated, among other grounds, the objection that the justice had no jurisdiction of the action, it being for seamen's wages.

*Alanson Nash*, for the appellants.

I. The district court has no jurisdiction of an action brought by a seaman or mariner, or other person belonging to a ship or vessel for seamen's wages. Sayre's Laws, p. 52, chap. 71, 82; Laws of 1819; Davies' Laws, 629. When an assignee takes a claim, he takes it subject to all the equities and burthens of the original party.

II. The plaintiff cannot maintain this action; the due bill is payable to William Scotsmer, or order, and is not indorsed, and, therefore, is not negotiable. The only evidence of any delivery to the plaintiff in this suit is, that Scotsmer handed it to the plaintiff, without proof of any authorization to collect it.

III. If the plaintiff is successful in this matter, William Scotsmer, the pretended assignor of the plaintiff, may sue Clark & Deane, the defendants here, and they could not plead this present suit as a bar, for this same sum of money.

*H. W. Channing*, for respondent.

DALY, J.—The instrument upon which the plaintiff sought to recover was not a promissory note. The undertaking in a promissory note or bill of exchange must be, to pay absolutely and at all events, and must not depend upon a contingency. *Carlos v. Fancourt*, 5 T. R. 482; *Kingston v. Long*, Bayley, 13. It was a special agreement to pay Scotsmer \$40, being the amount of his advance wages in the ship called the Arabia, provided he proceeded to sea in that vessel according to the shipping articles. In promissory notes and bills of exchange, a consideration is

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*Loftus v. Clark.*

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presumed and need not be proved, but here the consideration is expressed upon the face of the instrument, and, to establish the defendants' liability, it was necessary to show that Scotsmer went to sea in the vessel. Though made payable to Scotsmer's order, it was not necessary as in the case of a promissory note, or other negotiable instrument made payable to order, that he should indorse it. The delivery of it, by Scotsmer, to the plaintiff, with the intent to vest in the plaintiff all the interest Scotsmer had in it, to transfer to the plaintiff whatever claim or demand Scotsmer had, or might have upon it, against the defendants, was sufficient to pass the legal title to it, and vest it in the plaintiff. *Hastings v. McKinley*, 1 E. D. Smith, 273. It was shown that the plaintiff kept a boarding-house; that Scotsmer boarded with him, and that he gave it to the plaintiff for board, and for an amount which the plaintiff had advanced to him. This was sufficient to show a good and valid transfer of it to the plaintiff.

This was not an action for seamen's wages, but upon a written instrument by which the defendants promised to pay William Scotsmer a certain sum of money, if he would do a certain act. It was a promise founded upon a good and valid consideration. The liability of the defendants does not grow out of services rendered to them by Scotsmer, as a mariner, but because they agreed to pay him \$40, his advance wages, if he would proceed to sea in a certain vessel; or if it could be regarded as an action for seamen's wages, it was not shown that the defendants were the owners of the vessel, and the act of 1819 deprives the justice of jurisdiction of actions for seamen's wages, only where the action is against the owner, master or commander of any ship or vessel, upon a contract made with the owner, commander or master. Davies' Laws relating to the city of New York, p. 501.

No question is raised by the appeal as to the authority of the defendants' clerk to make such a contract on behalf of the defendants, or any question as to whether Scotsmer proceeded in the vessel according to the terms of the contract. The justice found upon both these points in favor of the plaintiff; and no objection is

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taken as to the sufficiency of the evidence to warrant his so finding, except that the judgment should have been for the defendants, which is not a sufficiently specific statement of a ground of appeal.

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#### CHRISTOPHER C. ELLIS v. ROBERT McCORMICK.

It is not sufficient, to avoid a contract, that the party bound by it is illiterate, and that it was not read over to him, if it was explained to him in substance, and there was no omission, concealment, or misrepresentation of any of its obligations. The non-performance by the landlord, within the time specified, of an independent agreement endorsed upon the lease to make certain improvements in the demised premises, does not discharge the whole contract, so as to relieve the tenant from liability for rent, and release the surety.

In such case *it seems* that the tenant may sue for damages, or make the improvements and deduct the expense from the accruing rent.

An agreement on the part of a creditor to accept, from the principal debtor, a sum less than the stipulated amount, without any other change in the agreement between them, will not discharge a surety for the debt.

APPEAL by defendant from a judgment of the Sixth District Court. This was an action against the defendant as surety upon a lease. The lease was made by the plaintiff to one Francis Crossin, for five years from the 1st of May, 1854. It was in evidence that the defendant could neither read nor write, and he signed the agreement as surety with his mark. On the lease was indorsed an agreement by the landlord, the plaintiff, to put blinds on all the front windows within thirty days. This agreement was dated the same day as the lease, and recited that it was made in consideration of the letting. These blinds were not put up until after the expiration of the thirty days. The rent, as fixed in the lease, was at the rate of forty-three dollars per month. But there was some evidence tending to show a subsequent agreement, reducing the rent to forty dollars a month. Judgment was rendered for the plaintiff for eighty-six dollars, the two months' rent sued for, viz., October and November, 1856.

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*W. E. Robinson*, for the appellant.

*Stillwell and Swain*, for the respondent.

BRADY, J.—It is a settled rule of law, and followed in equity, that fraud will never be presumed, but must be clearly established by proof. Story on Contracts, 505 (3d ed.), § 499. And although a party may sometimes be relieved from a mistake in regard to a material fact affecting or modifying the contract, the proof of mistake must be established with equal clearness. It is not sufficient, to avoid a contract, that the party bound is unlettered, and that the contract was not read to him. *Harris v. Story*, 2 E. D. Smith, 363. It is sufficient if it be explained in substance, and there was no suppression or concealment, or misrepresentation of any of its obligations. The testimony, in this case, fails to show any fraud or mistake. The witness, Campbell, stated that he did not know whether the lease was read to the defendant when he signed it with his mark, and that what was said at the time went to show that plaintiff and defendant "would be so well acquainted in one year that *probably* the security would not be looked to after that time." This shows that it was understood, at the time the defendant assumed his responsibility, that it extended over the term of the lease, and that he assumed the contingency of his not being "looked to" after the first year. The statement of the witness, in continuation—"and therefore it was not necessary to alter the writing, as the parties were good enough without implicating the defendant"—does not alter or affect this view. The alteration not having been made at the time, is an answer to any presumption that such statement might create.

The agreement indorsed on the lease, to put blinds on all the front windows above the store in thirty days from its date, is an independent agreement, although it purports to have been made and executed on the same day with the lease. This appears from the statement that, "*In consideration of the foregoing letting*," referring to the lease, the lessor agreed to put the blinds on; but

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whether it was or not, the non-performance of it within the time specified would not discharge the surety. The tenant could not urge such failure in discharge of the whole contract, and what would not avail him as a defence in that respect could not enure to the benefit of his surety. At best, he could either put on the blinds, and deduct the expense from the accruing rent, or sue for damages, arises from the landlord's breach. But, independently of this view of that branch of this case, the rent sued for accrued long after the shutters were, in fact, put up by the landlord, and after payment of rent by the lessee, which would operate as an estoppel upon the defendant in any event.

It is said that the lessor, as an accord and satisfaction of the tenant's claim for damages sustained in consequence of the landlord's omission to put on the blinds, agreed to take \$40, instead of \$43, a month for the premises—the latter being the amount secured by the lease—and that such agreement discharged the surety. The testimony on the subject, in the court below, was conflicting, and the justice has found against such allegation. When this cause was submitted, something was said in relation to the manner in which the justice disposed of the case on the apparent conflict, and to the effect that he did not consider it as to the alleged subsequent agreement. The testimony does not seem to be conflicting upon any other material fact, and we must consider the finding of the justice, on all the issues involved, as having been made in the usual manner, and in accordance with the usual rules to be observed in the administration of justice.

It may be proper to observe here, that if the case presented the question whether the agreement, to receive \$40 in lieu of \$43 per month, discharged the surety, it would not have any such legal operation. The surety has a right to insist on the very terms of his agreement, and that no alteration of the agreement between the principal and debtor shall be made, even if it be for the benefit of the surety (*Coleman v. Lamb*, 15 Wend. 332, and cases cited; *Dobbin v. Bradley*, 17 ibid. 422; *Buckhead v. Brown*, 5 Hill, 640; *Bangs v. Alcott*, 7 ibid. 250; *Coleman v. Wade*, 2

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Selden 44); but none of these cases present the fact involved here, nor are they analogous. The terms of the agreement, as to the time of payment and the duration of the tenancy, are not affected by the agreement subsequently made. It is a consent to accept a sum less than would accrue under the agreement, without extending the time of payment in any manner. No case has carried the doctrine mentioned so far as to relieve or discharge the surety where the principal agrees to accept less than the stipulated amount, without any other change in the agreement.

Judgment affirmed.

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HORACE DRESSER, assignee of Asahel Abbot, *v.* REUBEN W. VAN PELT.

Mere impressions of a witness, unaccompanied by any circumstance, are of no avail in opposition to positive testimony.

Under a plea of the statute of limitations, the assignor of plaintiff swore positively that a part payment had been made, but stated that he could not say positively it was made within six years, although he believed it was. The defendant swore positively that he had made no payment within the six years.

*Held*, that a finding of the justice in favor of the plaintiff was clearly against evidence; that this was not a case of conflict of testimony, but of imperfect recollection on one side and positive recollection on the other.

APPEAL from a judgment of the Sixth District Court. This action was brought to recover for instruction in music, given by the assignor of the plaintiff to the defendant, upwards of seven years before the commencement of the suit. To meet the defence of the statute of limitations, the defendant relied on an alleged part payment of \$5 within six years. The evidence on this point is stated in the opinion.

The justice rendered judgment for the plaintiff, and the defendant appealed.

*Coe and Wallis*, for the appellant.

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The respondent, in person.

DALY, J.—The assignor of the plaintiff swore that he believed, but was not certain, that the \$5 was paid within six years; that he could swear positively that the defendant had paid him \$5, but could not swear positively that it had been paid within six years. The defendant swore that he did not, within the last six years, pay the assignor \$5 on the bill in suit. The finding of the justice, therefore, was clearly against evidence. The assignor merely swore to his belief or impression. He did not strengthen it by any circumstance that could guide the justice, except that it was about the time when the defendant and the plaintiff dissolved partnership, without stating when they dissolved. It was not a conflict of testimony upon which the finding of the justice would be conclusive, but of imperfect recollection on one side and of positive recollection on the other. In such a case, there could be no weighing of testimony. The belief of a party to an act, who cannot swear that it occurred within the six years preceding the time that he is examined—who cannot fix it, or swear positively that it took place at least within that range of time—amounts to nothing when there is positive evidence that it did not occur within that period. Presumptively the claim was barred by the statute, and it was for the plaintiff to remove that presumption, by showing that the defendant had made a payment upon it within six years before the commencement of the suit, which he did not do. The defendant having sworn positively that it was not made within that time, and the plaintiff offering nothing but the uncertain impression of the assignor against the positive statement of the defendant, upon such evidence, there could be no alternative but to find for the defendant.

Judgment reversed.

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Nixon v. Jenkins.

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JOHN C. NIXON and GEORGE W. NIXON v. WILLIAM H. JENKINS and MARTIN H. PORTER.

The plaintiffs and the defendants owned respectively lots of land adjoining each other. The plaintiffs, by mistake, paid the tax due on the defendants' land, and on acquainting one of the defendants, who were joint owners of the land, with the fact, he promised that they would repay it.

*Held*, that there was a sufficient consideration to sustain the promise, and that the defendant making it was liable thereon, but not the other defendant.

Although individuals may be partners in real estate, the statement of one to that effect will not bind the other without further proof of joint ownership.

The title of the defendants to the lot in question not having been disputed upon the trial, *held*, that the title to lands did not come in question so as to deprive a district court of jurisdiction of the cause.

**APPEAL** by plaintiffs from a judgment of the Second District Court. This was an action to recover for money paid by the plaintiffs, to the use of the defendants, under the following circumstances: The plaintiffs and the defendants owned adjoining lots of land in Brooklyn. By mistake, owing to a confusion in the numbers of the lots, the plaintiffs paid the taxes, \$41.40, due on the defendants' lot. Having discovered the error, they acquainted the defendants of it, and the defendant Porter promised that they would repay it. Having failed to do so, this action was brought against them to recover the amount of that payment. The justice dismissed the complaint.

*William M. Allen*, for the appellants.

*Tomlinson, Walden and Brigham*, for the respondents.

BRADY, J.—The title to land of the plaintiffs did not come in question on the trial of this action, and the title of the defendants to the land on which the taxes were alleged to have been paid was not disputed on the trial. It seems to have been conceded that the defendants owned the land on which the taxes were paid, or that the defendant Porter owned it conjointly with the other defendant. According to the testimony of Mr. Allen, Porter so stated, and promised to pay the taxes paid by the plain-

## Nixon v. Jenkins

tiffs. He (Porter) stated that "the assessment number on the assessment map of Porter & Jenkins' map was the same as the street number of Nixon's; that Nixon had paid the tax of Porter & Jenkins, instead of his own, by a mistake." This promise to pay was repeated by Porter on two occasions subsequent to the interview referred to. If the defendants, or either of them, are liable to the plaintiffs on the evidence of the plaintiffs' witnesses, it is not a sufficient answer that the defendants' property could not be sold until September, 1856. The taxes were due and payable, but the property could not be sold until the expiration of the period limited by the statute. The obligation to pay, however, existed, and that was sufficient. The consideration of the promise was good, therefore. The money paid was for the defendant Porter's benefit, to which he assented by promising to pay. He derived a benefit from it, and that was equivalent to a previous request. *Doty v. Wilcox*, 17 Johns. 378. It is not an answer to this view, that the defendants might have preferred to have the property sold, inasmuch as the action is founded on the promise to pay the tax, and which promise is sustained by a good consideration. There is no proof, however, that Jenkins owned the lot on which tax was paid, or any part thereof. Porter said that he did own it conjointly with him, but that admission or statement did not bind him, or prove the fact. Although individuals may be partners in real estate, the statement of one of them to that effect will not bind the other as to charges upon such estate, without further proof. No evidence, therefore, having been given to charge Jenkins, the justice would have properly disposed of the case by giving judgment in favor of the plaintiff against Porter, and against him as to Jenkins. The Code, section 274, explained in *Bumskill v. James* (1 Kern 301), makes such a course the duty of courts. I think that Porter was liable on his promise to the plaintiff, and that judgment should have been given against him, and that the judgment should be reversed as to the defendant Porter.

Judgment reversed as to defendant Porter.

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Edgerton v. Page.

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## THEODORE T. EDGERTON v. ROBERT W. PAGE.

E. leased certain premises to P. for one year, with the privilege of a year's renewal at the same rent. In an action for the last quarter's rent of the first year, P. alleged, as a defence, that the plaintiff had maliciously and wantonly allowed large quantities of waste water to come down into the demised premises, greatly injuring his goods and compelling him to leave the premises at the end of the first year, thereby losing the privilege of renewal. The defendant having remained in possession of the premises during the entire year: *held*, on demurrer to answer, that these facts constituted no defence.

1. They did not amount to an eviction. Every obstruction by the landlord to the beneficial enjoyment of the premises demised does not constitute an eviction. To constitute an eviction, the lessee must have been compelled to abandon the whole or some part of the premises by the wrongful act of the lessor.
2. Nor did they constitute a ground for a counter-claim or recoupment. Every act of the landlord, disturbing the tenant's beneficial enjoyment of the demised premises, does not constitute the basis of a counter-claim or recoupment in an action for rent, but only such acts as amount to an eviction, total or partial, or an unlawful injury to the premises in violation of the contract of letting.
3. They show merely a disturbance of the beneficial enjoyment of the tenant, but no interference with his possession.
4. A trespass of the nature alleged, not made under an assumption of title, is no breach of the contract of letting—is not a cause of action arising out of the contract, upon which the landlord's claim is founded—and therefore cannot be said to be connected with the subject of the action.

A covenant for quiet enjoyment, expressed or implied in a lease, relates only to title, and not to the undisturbed enjoyment of the premises demised, when there has been no eviction or entry under assumption of title.

*Per BRADY, J., dissenting* :—A tenant has a right to abandon the demised premises at any time during the landlord's continuance of the disturbance of his beneficial enjoyment of the premises. If the disturbance cease before the rent becomes due and while the tenant is still in occupation, the rent may be recovered. If the disturbance continue during the whole period of that part of a term during which rent accrues, and down to the time when the rent becomes due by the agreement, and the tenant then abandons the premises in consequence of such disturbance, the rent cannot be recovered.

APPEAL by plaintiff from an order at special term, overruling a demurrer to answer. This action was brought to recover rent. The plaintiff leased to the defendant the first floor of No. 8 Fulton street, New York city, at a yearly rent of \$1,500, for one

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year from the 1st of May, 1854, with the privilege of one year's renewal at the same rate. This action was brought to recover the rent due for the quarter ending 1st May, 1855.

The answer alleged that the privilege of renewal contained in the lease was one of the main inducements to defendant to take the lease, and one of the principal causes of its value; that the plaintiff occupied the entire upper part of the building No. 8, and also of the adjoining one, No. 10; and that, during the quarter for the rent of which this action was brought, he wantonly, maliciously and negligently permitted a certain waste-pipe, coming down through the rear of the building No. 8 Fulton street, and communicating with a sewer underneath, which waste-pipe was used for the purpose of carrying off the waste water from the upper stories of the buildings Nos. 8 and 10 Fulton street, the premises occupied by the plaintiff, to get out of order and leak, so that large quantities of the waste water and other filth flowed down through the ceiling and upon the floor of the demised premises, interfering with and depriving the defendant, in a great degree, of the beneficial enjoyment thereof, and injuring and destroying the property of the defendant; that the plaintiff knew these facts at the time, and might, by the exercise of ordinary care, have prevented the injury, but, though requested to repair the pipes, refused to do so; and that, in consequence of the injuries to the defendant's business, occasioned thereby, he was compelled to abandon the premises about the first of May, and was thus wholly deprived of the privilege of renewal created by the lease. These facts, he claimed, amounted to an eviction, and he also claimed to recoup or set off the damages suffered, against the rent claimed, and claimed an affirmative judgment therefor.

The plaintiff demurred to this answer. The demurrer was overruled, and the plaintiff appealed.

*Britton and Ely*, for the appellant.

I. There is no allegation which shows that the evil complained of occurred from any fault of plaintiff; for,

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1. There is no covenant to repair contained in the lease set forth in the answer.

2. In the absence of such express covenant, there is none implied. *Taylor L. & T.*, 327, 343.

3. Nothing appears but that the evil complained of resulted from the improper condition of the pipes upon the defendant's premises, and used by him, as there is no allegation that these pipes were *exclusively* used for account of the premises above, nor does it appear but that it actually existed when the quarter commenced, and in fact when the lease was taken; and suffering it to be so would be no eviction, nor would it constitute any cause of action. *Speckels v. Sax*, 1 E. D. Smith, 253; see *Etheridge v. Goborn*, 12 Wend. 529.

II. Defendant cannot claim a reduction of the rent for any tortious act of the landlord, by which defendant was disturbed while in possession of the demised premises; for,

1. These damages do not arise out of the contract between the parties, and the acts complained of are as independent of the covenants between them as any trespass or other act of force committed by a stranger upon the tenant. *Cram v. Dresser*, 2 Sand. S. C. R. 120, 127; *Levy v. Bend*, 1 E. D. Smith, 169; *Drake v. Cockcroft*, 10 Howard's Prac. 377; *Mayor, &c., of New York v. Mabie*, 2 Duer, 401.

2. Damages for a wilful trespass cannot be the subject of set-off, nor can damages for a trespass, not constituting a breach of contract declared on, be recouped, and the counter-claim under the Code includes only what might thus have been set up under the old system. See same cases as above.

3. There is no breach of the contract declared on, as in the absence of *express covenants* there is no covenant whatever implied, not even for quiet enjoyment. The word "demise" may imply a covenant for quiet enjoyment (see *v. Adams v. Gibney*, 6 Bingham, 656; 4 M. & P. 491; 1 Woodfall's Tenants' Law, 311); but a mere relation of landlord and tenant creates no such covenant. *Granger v. Collins*, 6 Meeson & Welsby, 458; *Mayor, &c., of New York v. Mabie*, 2 Duer, 401.

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“Let” is not equivalent to “demise.” *Messeat v. Reynolds*, 8 Man. Gran. & Scott, 194.

4. If, however, there is such an implied covenant, a covenant for quiet enjoyment is, at most, only a warranty of title in the lessor, and that the tenant shall enjoy such *title* undisturbed (see Woodfall's Tenants' Law, 318), and is not broken by a trespass, but by an eviction only; or by an entry under an assumption of title. *Holden v. Taylor*, Hobart, 12; *Levi v. Stephenson*, 5 Bing. N. C. 183; Woodfall's Tenants' Law, 412; *Waldron v. McCarty*, 3 John. 472; *Kertz v. Carpenter*, 5 ibid. 121; *Etheridge v. Osborn*, 12 Wend. 529; *Watt v. Coffin*, 11 John. 495; *Levy v. Bend*, 1 E. D. Smith, 169; *Drake v. Cockcroft*, 10 How. 377.

III. There are no facts alleged constituting an eviction, notwithstanding any assumption of title by the landlord; but, on the contrary, the complaint shows there was no eviction; for,

1. It is admitted that if a tenant is evicted by the landlord from any part of the demised premises, the obligation under the lease to pay rent ceases; and though the tenant occupies the residue of the premises, yet he incurs no liability for rent therefor under such agreement, as the eviction debars the recovery of any rent under said agreement, until the possession of the whole is restored. *Smith v. Raleigh*, 1 Campb. 513; *Lewis v. Payne*, 3, 4 Wend. 423; *Zule v. Zule*, 24 ibid. 76; *Lawrence v. French*, 4, 25 ibid. 453; *Dyett v. Pendleton*, 8 Cowen, 731; *Hegeman v. McArthur*, 1 E. D. Smith, 147; *Christopher v. Austin*, 1 Kernan, 216; *Taylor L. & T.* 183, 184.

2. It is admitted that an expulsion or physical eviction is not necessary to constitute an eviction; it is enough that there is an interference by the landlord with or a disturbance of the tenant's beneficial enjoyment or use of the demised premises, intentionally committed and injurious in its character. *Salmon v. Smith*, 1 Saund. 204; *Hunt v. Cope*, 1 Cowp. 242; *Pendleton v. Dyett*, 4 Cowen, 581; *Dyett v. Pendleton*, 8 ibid. 727; *Ogilvie v. Hull*, 5 Hill, 52; *Cohen v. Dupont*, 1 Sand. S. C. R. 260; *Taylor's L. & T.* 443.

3. But such interference or disturbance is not tantamount to

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an eviction before the tenant leaves the premises. The tenant cannot be evicted and still occupy; it involves an absurdity and a contradiction in terms. The true doctrine is simply this: When there is an actual expulsion from the premises or from any portion thereof, or such an interference with the beneficial enjoyment as to justify the departure of the tenant, and he abandons the premises before the expiration of his term, there is an eviction; but when there is simply an intrusion upon the premises, or a destruction of property thereon, or an injury to the enjoyment, the tenant still occupying the whole, there is only a trespass. Cases above cited; *Cram v. Dresser*, 2 Sand. S. C. R. 120; *Campbell v. Shields*, 11 How. 565; 3 Kent's Com. 463, 4th ed., note; *Gilhooly v. Washington*, 4 Comst. 217.

4. The defendant did not, in this case, leave until after the expiration of the term; and, by the terms of the contract, the rent had fallen due, and leaving at such a time could constitute no bar for the rent for that term. *McCarty v. Hudson*, 24 Wend. 293; *Cohen v. Dupont*, 1 Sand. S. C. R. 264.

IV. Nor could any damage be claimed or recouped for breach of covenant of renewal, for there is no allegation of refusal to renew. See *Etheridge v. Osborn*, 12 Wend. 529.

*John Graham*, for the respondent.

DALY, J.—The matters set up by the answer are relied upon, either as a bar to the action, or as establishing a claim for damages against the plaintiff, which may be set up in this action by way of counter-claim.

It is not denied by the answer—indeed, the answer admits—that the defendant continued to occupy during the whole period for which rent is claimed, and the first question presented is, whether a tenant, who thus continues in the occupation of the whole of the premises demised, is released from the payment of rent because the landlord has committed acts which have diminished the beneficial enjoyment of the premises during the period for which rent is sought to be recovered.

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To occasion a suspension or extinguishment of rent, there must be an eviction of the tenant, and, as this was understood before the decision of *Dyett v. Pendleton* (8 Cow. 727), it meant that the tenant must be *put out of possession* either of part or of the whole of the premises demised. *Co. Lit.* 148, *b*; *Dorrel v. Andrews*, Hob. 190, *a*; *Reynolds v. Buckle*, *ibid.* 826, *a*; *Hodgeson v. Robson*, Vent. 276; *Pollexf.* 142; *Trumbull v. Bullock*, *Styles*, 446; *Salmon v. Smith*, 1 *Wm. Saund.* 204, and note 2; *Hunt v. Cope*, *Cowp.* 243. Thus the form of the plea, as given in *Saunders*, was, "and *expelled*, and removed him, the said Samuel, from his possession thereof, and *kept out* him, the said Samuel, from his possession thereof." This was the form of the plea in *Dyett v. Pendleton* (4 Cow. 584); and as some misconception has prevailed, as to what was actually determined in the ultimate disposition of that case by the Court of Errors, it may be well to review that decision.

To maintain the plea that the plaintiff had expelled him from the possession, the defendant offered to prove, upon the trial, that the plaintiff introduced, into the part of the house which he occupied, lewd women and prostitutes at various times, keeping them all night for the purpose of prostitution; that he was in the habit of introducing other men, who, with himself, kept company with the women, and who together kept up such noise and disturbance throughout the night, using obscene and indecent language, so as to disturb the rest of persons sleeping in the part of the house demised to the defendant, in consequence of which the defendant was compelled to leave the house before the rent became due for which the action was brought. It was held by the Supreme Court (4 Cow. 584), that the evidence was properly excluded; that there could be no eviction without an *actual entry* and *expulsion*; that the matter complained of simply amounted to a nuisance, which the defendant could have abated by applying to the police; that he was under no necessity, physical or moral, to abandon the premises; and that his abandonment was voluntary, and was no answer to the covenant for the payment of rent.

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The decision of the Supreme Court was reversed by the Court of Errors (8 Cow. 729), and that judgment of reversal determined merely that proof of an *actual entry* was not essential to establish an eviction, but that, without an actual entry upon the premises, the landlord might be guilty of acts which, by compelling the tenant to quit the premises, would amount to an eviction, and that, upon the evidence excluded at the trial, the jury could have found that the defendant was justified in quitting the premises, and having done so, that he was released thereafter from any further liability under the covenant in the lease for the payment of rent.

This is all that I understand to have been decided by that case, though it has been supposed to have gone much further. Thus Savage, C. J., in *Lewis v. Payne* (4 Wend. 428), said, "In *Dyett v Pendleton*, it seems to have been held that *any obstruction*, by the landlord, to the beneficial enjoyment of the demised premises, or a diminution of the consideration of the contract, by the act of the landlord, amounts to a constructive eviction." The only foundation for this opinion is to be found in one of the reasons assigned by Senator Spencer, who delivered an opinion for reversal, to show that actual entry was not essential to an eviction.

In referring to the rule, that a tenant, who has been evicted from part of the premises by the act of the landlord, is not obliged to pay rent for the part he retains until he is restored to the whole possession, Senator Spencer says, "As to the part retained, this is deemed such an injury to its beneficial enjoyment, such a diminution of the consideration upon which the contract is founded, that the law refuses its aid to coerce the payment of any rent. Here, then, is a case where actual entry and physical eviction are not necessary to exonerate the tenant from the payment of rent; and if the principle be correct as applied to a part of the premises, why should not the same principle equally apply to the whole property demised, where there has been an obstruction to its beneficial enjoyment, and a diminution of the consideration of the contract, by the acts of the landlord, although those acts do not amount to a physical eviction."

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But the ground here taken, that any obstruction by the landlord to the beneficial enjoyment of the premises demised, or diminution of the consideration of the contract, amounts to an eviction, was not essential to the decision of *Dyett v. Pendleton*. It is not, and never was the law, nor is the case an authority for any such proposition or principle. If any obstruction to the beneficial enjoyment, or diminution of the consideration of the contract, will exonerate the tenant from the payment of rent, then any act of trespass on the part of the landlord will have that effect; and it is well settled that something more than a mere trespass is essential to an eviction, however much the act of trespass, or successive acts of trespass, may obstruct the tenant in the beneficial enjoyment, or diminish the consideration of the contract.

"The title to rent," says Bacon (6 Bac. Abr., Rent, L. 44), "is founded upon this, that the land demised is enjoyed by the tenant during the term included in the contract, for the tenant can make no return for a thing he has not. If, therefore, the tenant be deprived of the thing letten, the obligation to pay the rent ceases." But it was held before Bacon's time (Hawson's case, Clayton, 34; 18 Vin. Abr., 504, tit. Rent [A a], pl. 11; *Bushell v. Lechmore*, 1 Ld. Ray. 369), and uniformly adhered to since, that a mere entry and trespass upon the land by the landlord is not such a deprivation, and will not suspend or discharge the payment of rent. In the first of these cases (Hawson's case), the court held that the breaking of a partition wall by the landlord will not extinguish the rent, for there must be a continuance of the possession and a putting out of the lessee. In *Vermilyea v. Austin* (2 E. D. Smith, 208), I had occasion to point out that Senator Spencer had mistaken the reason of the rule, that eviction from part, by the act of the landlord, shall suspend the rent of the whole. It is not founded upon the diminution of the consideration of the contract, or the injury to the beneficial enjoyment; and this mistake led to the erroneous conclusion he arrived at. This rule, in respect to the soundness of which there was great contrariety of opinion before it was definitely settled and recog-

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nized (6 Bac. Abr. M 2), was founded upon the policy of the feudal law, by which the landlord was bound to protect and defend his tenant; and such being the obligation springing out of the relation, the landlord, who had wrongfully dispossessed the tenant of part, would not be allowed to *apportion* his own wrong, and recover rent *pro rata* for the residue of the land, but the rent was suspended until the landlord fulfilled his obligation, and restored the tenant to the possession of the whole. Co. Lit. 1, 486; *Hodgkin v. Robson*, Vent. 276; Pollexf. 142; Brooke Abr. tit. Extinguishment, 48; Roll. Abr. 938; 6 Bac. Abr. Rent, M 1, p. 49.

In *Dyett v. Pendleton*, the tenant abandoned the premises before the rent became payable, and all that was or can be said to be decided by the case was, that to constitute an eviction it was not necessary that the landlord should actually enter and expel the tenant from the possession, but that he might be guilty of acts which, by compelling the tenant to abandon the premises, would have the same effect as if there had been an actual entry and a physical expulsion. In other words, that there might be constructive as well as mere physical eviction, which was very well illustrated by Senator Spencer, by supposing that the landlord in that case had converted the portion of the house which he occupied into a small-pox or yellow-fever hospital, or had made a deposit of gunpowder under the tenant, in which case the abandonment of the premises by the tenant might become a matter of necessity, and his expulsion accomplished as effectually as if the landlord had entered and turned him out by force. "Whether," says Crary, the other senator, who delivered an opinion in favor of reversing the judgment of the Supreme Court, "it was an unnecessary and voluntary abandonment of the premises on the part of the tenant, or compelled by the moral turpitude of the landlord, is the only question material to be considered." In *Jackson v. Eddy and others* (12 Miss. 209), a case in many respects resembling the present one, and to which I shall have further occasion to refer, it became essential to ascertain exactly what was determined by *Dyett v. Pendleton*, and the principle or rule established by that case is thus stated:

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"Any act of the lessor, which defeats the enjoyment of the property by the lessee, is a good bar to the demand for rent, *provided the lessee abandon the premises in consequence of such wrongful act of the lessor.*"

The Court of Errors, in establishing this doctrine of constructive eviction, made no change in the law. They overturned no principle or rule established by previous decisions, but merely extended the application of an acknowledged principle, in a case which justified the extent to which they carried it. This was the view taken of the case by Nelson, J., in *Ogilvie v. Hull* (5 Hill, 54), and by Bronson, J., in *Gilhooly v. Washington* (4 Com. 219). It was entirely consistent with the existing law, to hold that a landlord, who compelled a tenant to abandon the premises demised, by acts which rendered the further occupation of them impossible, inconvenient, or useless, evicted the tenant as fully, to all intents and purposes, as if he had gone upon the premises and ejected him from the possession by force.

In *Cohen v. Dupont* (1 Sand. S. C. 260), the tenant left in consequence of a series of petty annoyances on the part of the landlord, which seriously injured the tenant's business, and it was held to be an eviction. In *Jackson v. Eddy, supra*, the tenant occupied the store and cellar of a building, the upper part of which was occupied by the landlord as a grocery store, and the dripping from the salt, tar, &c., in the loft, or floor occupied by the landlord, passed through the floor into the store occupied by the tenant, upon his sugar hogsheads, brooms, &c. The tenant complained, and the landlord tried to prevent further injury by sprinkling sawdust on the floor above, which only stopped the leakage temporarily. The tenant left before the commencement of the last quarter, and sent the key to the landlord, who refused to receive it. The action was for the last quarter's rent, and it was held that the tenant having abandoned the premises before the beginning of the quarter for which rent was claimed, in consequence of a disturbance of the beneficial enjoyment by the act of the landlord, the action could not be maintained, and the law upon the subject is thus succinctly stated by the court: "The

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consideration of the lessee's undertaking to pay rent is the quiet, peaceable, and indisputable possession of the premises leased, and is, in its nature, a condition precedent to the payment of rent. If the lessor, by any wrongful act, disturbs that possession, which he should protect and defend, he thereby forfeits his right, and the lessee may abandon the possession of the premises leased, and *thereby* exonerate himself from liability to pay rent."

In all these cases the tenant abandoned the premises, and thereby discharged himself from all further liability for rent, but no case has ever gone the length of holding that a tenant, disturbed in the beneficial enjoyment by the act of the landlord, may continue in the possession of the whole premises, and be exempt from the payment of rent. There must be an eviction of the whole or of some part, and there can be no eviction, if the tenant continues in the possession of the whole, however much he may be disturbed in the beneficial enjoyment. For that disturbance, as has been already shown, the landlord is liable as a trespasser, but it does not put an end to the contract. Every eviction includes an ouster either of the whole or of some part. 6 Bac. Abr. by Bayley, note 44; 1 Lord Ray. 369. It must amount to a deprivation of possession. The possession must be given up by the tenant in consequence of the acts of the landlord, and they must be acts which warrant and justify the tenant in so doing, or the landlord must have taken the possession forcibly from the tenant. In short, there must be a change of possession. It must be out of the tenant, and in the landlord.

This is manifest upon referring to the early cases. In *Cibel v. Hills* (1 Leon. 110; 18 Vin. Abr. Rent, 1, pl. 2, p. 513), it was held that the possession must be in the landlord to suspend the rent. In *Reynolds v. Buckle* (Hob. 326, a), the defendant pleaded that before rent due "the plaintiff did enter upon him, but did not say that he did expel him or hold him out," and it is said, in the report of the case, that, as a plea in bar, it was insufficient. In *Jones v. Boddinger* (Comb. 380), it is said, expulsion makes the first part of the bar, and holding out the rest. In *Arnold v. Foot* (3 Keb. 453), the plea was declared bad, because it is not

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and *expulsiō* or *amovit*, nor that the plaintiff continued in possession, as it ought to be, being pleaded by way of suspension, and in *Hunt v. Cope* (Cewp. 243), Aston, Justice, said: "All the cases in the books suppose the lessee to be put out of possession; therefore, merely saying that he is deprived of the enjoyment of the premises is not sufficient," and the plea was held no bar. The distinction which runs through all the early cases, that it is the deprivation of the possession of the whole, or of some part, by the wrongful resumption of it, on the part of the landlord, which works the suspension or extinguishment of rent, has been recognized and acted upon in several American cases. *Briggs v. Hall*, 4 Leigh, 485; *Jackson v. Eddy, supra*; *Bennett v. Bitile*, 4 Rawle, 339; *Cram v. Dresser*, 2 Sandf. S. C. 120; *Wilson v. Smith*, 5 Years, 399. In this last case, it is said, "an interference by the landlord, unless the tenant be wholly *evicted* and *expelled* from the possession, is not a discharge from the payment of the stipulated compensation; but makes the enterer, upon his possession, a trespasser liable to make satisfaction for the damages in the appropriate action," and it was further remarked, that the relation of tenant continues as long as the tenant continues to hold the possession. Sometimes the distinction between a mere trespass and an eviction is very nice; as in *Briggs v. Hall, supra*, where the landlord entered upon a farm he had demised to the tenant, and mowed the meadow land. This was held to amount to an eviction, because the principal enjoyment and possession of a meadow land is the taking and using the hay, and the man who does this is to every rational purpose the possessor. This was an extreme case for declaring that the possession of part of the premises demised was in the landlord, and not in the tenant, but it shows that this change of possession must take place, or there is no eviction. In the case before us the defendant remained in possession, until the full end of the term, for which rent is claimed. He has not, therefore, been evicted, and his answer is no bar to the action for rent. The acts of which he complains would entitle him to maintain an action against the plaintiff, equivalent to what was formerly denominated an action on the case, and it

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only remains to consider whether this cause of action can be set up in this suit, by way of counter-claim.

He claims that he sustained damage to the amount of two hundred and fifty dollars, in the hindrances, obstructions, delay and difficulties occasioned to, in, and about the prosecution of his business, and further sets up, that during the quarter in question large quantities of water were poured and thrown out of the rear windows of the plaintiff, wantonly, maliciously and negligently, by the plaintiff and his servant, so as to run into and upon the premises leased to the defendant, whereby his property there deposited, consisting of fruits and other articles, was injured and destroyed to the amount of one hundred and fifty dollars. Is ~~this~~ a cause of action arising out of the contract, which constitutes the foundation of the plaintiff's claim in this action, or is it connected with the subject of the action within the meaning of the 150th section of the Code?

Before the last amendment of this section, we held, in *Levy v. Bend* (1 E. D. Smith, 169), that damages for a tortious intrusion upon the demised premises, by the landlord as a wilful trespasser, not constituting a breach of the contract declared on, could not be set up, by way of recoupment, in an action brought to recover the rent, and after the section was amended in its present form, we held in *Drake v. Cockcroft* (4 E. D. Smith, 34), that in an action, by a landlord to recover rent, the tenant could not set up, as a counter-claim, a mere trespass upon the demised premises, and destruction of personal property committed by the landlord. In that action the answer set up that the defendant occupied a stable which constituted a part of the premises demised, and that the plaintiff, during the defendant's temporary absence, broke open the stable, and wilfully took and removed the personal property of the defendant therein, which was injured, destroyed and lost to the defendant. We held, that as a cause of action, this was wholly independent of the contract for the payment of rent. That the trespass for which damages were claimed could not be regarded as connected with the contract nor with the subject of the action, which was money due upon a contract of hir-

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ing; but it was admitted by Judge Woodruff, that an interference with the possession, an eviction, total or partial, or an unlawful injury to the premises in violation of the contract of letting, might, under a liberal construction of the Code, constitute a counter-claim.

The answer in this case shows a disturbance of the beneficial enjoyment, but no interference with the possession. Any trespass upon the premises demised is a disturbance of the beneficial enjoyment, but an interference with the possession is either an entry under color of right or assumption of title, or an absolute deprivation of the possession in whole or in part. The answer does not show an eviction, total or partial, or any unlawful injury to the premises in violation of the contract. There is implied in the contract, being a demise or letting for a year, a covenant for quiet enjoyment (*The Mayor of N. Y. v. Mabie*, 8 Kern. 151), but a covenant for quiet enjoyment, whether express or implied, relates only to title, and not to the undisturbed enjoyment of the premises demised where there has been no eviction, or entry under assumption of title. *Howard v. Doolittle*, 3 Duer, 474; *The Mayor of N. Y. v. Mabie, supra*; *Lloyd v. Tomkins*, 1 T. R. 671; Platt on Covenants, 312 to 320. Nothing of this kind appears by the answer. It sets up a trespass not made under an assumption of title, nor resulting in an eviction, and, therefore, no breach of the contract of hiring. It is not, then, a cause of action arising out of the contract, and as the contract is here the subject of the action, it cannot be said to be connected with the subject of the action.

The judgment of the special term should be reversed, and judgment given for the plaintiff on the demurrer.

**INGRAHAM, FIRST JUDGE.**—I concur with Judge Daly in the opinion that the matters set up in the answer do not constitute an eviction which either suspends or extinguishes the rent sued for. Down to the period when the rent became due, the defendant remained in full and sole control of the demised premises. The plaintiff neither took possession of any part of the premises,

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nor did the defendant abandon them prior to that time. The acts of the plaintiff which are complained of were mere trespasses, for which the defendant could have recovered his damages; but they did not amount to an eviction, nor would they, in my judgment, have authorized an abandonment of the premises. But whether they were sufficient to justify the abandonment or not, the defendant did not leave the premises, and therefore cannot claim to be relieved from the payment of the rent of premises which he had the entire use of during the whole term. The election not to renew a lease, which he had alone the right to determine, cannot be considered as an abandonment of premises so as to cause a suspension of rent which had accrued during the previous term.

The case of *Cohen v. Dupont* (1 Sand. S. C. R. 260) does not conflict with these views; because, if the cause of offence there was sufficient, the tenant actually left the premises before the rent became due.

The defendant sets up in his answer facts showing that during the term the plaintiff committed acts injuring his quiet enjoyment of the premises. Upon the argument of this case, I supposed these matters, set up by way of counter-claim, were not within the provisions of the Code on that subject, and were liable to the same objections as were stated in *Levy v. Bend* (1 E. D. Smith, 169) and *Drake v. Cockcroft* (4 E. D. Smith, 34). I do not see anything, on further examination, to change that opinion. In those cases, we held that a mere trespass by the landlord, which did not deprive the tenant of his possession, was not a breach of the covenant of quiet enjoyment; and that it was necessary, to establish a right to recover for such a cause of action, to show, that the tenant was deprived of some part of the demised premises. In *St. John v. Palmer* (5 Hill, 599), Judge Bronson says, "If the covenantee retains the possession, it is impossible that there should have been an eviction, and no action will lie, however hard the case may be.

Judgment at special term should be reversed.

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BRADY, J.—I still adhere to the opinion expressed by me on the decision of the demurrer in this action, that the answer sets up facts which are admitted to be true, and which constitute a defence to this action. I also adhere to the opinion that this case is a much stronger one for the application of the doctrine of constructive eviction than *Cohen v. Dupont* (1 Sand. 260), stated in the opinion referred to. My understanding of Judge Daly's opinion is, that the defendant not having abandoned the premises during the quarter, he was not evicted constructively or otherwise, and is not discharged. In answer to that view, I state that, by the lease, the defendant was entitled to a renewal of his term, which he abandoned because of the acts set up in the answer; and that if there was no abandonment during the quarter for which the rent is alleged to have accrued, there was an abandonment of the premises for the further term to which the defendant was entitled. I am not aware that any case has yet arisen in the courts, deciding the question directly as to when and under what circumstances the defendant must abandon the premises, to make an eviction perfect; although I think that in this case, as I have already stated, there was in fact an abandonment of the premises. I understand a tenant to abandon premises if he leave them before *his term* expires, or his right to possession ceases, without reference to the precise time when that abandonment takes place. I also understand the abandonment to be perfect when a tenant, having a right to a further term, leaves the premises upon the expiration of the original term, and that the rent accruing contemporaneously with such abandonment does not change the relative rights and obligations of landlord and tenant, as they existed immediately prior thereto. The law does not regard the fractions of a day. It seems to be conceded, that if the premises are abandoned before the rent becomes due, the eviction would be accomplished without reference to the part or portion which had expired of the period for which the rent is claimed. In the case of *Jackson v. Eddy and others*, cited by Judge Daly, the landlord tried to prevent further injury to his tenant from the causes complained of, and did so

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temporarily. In this case, the landlord neither did nor attempted to do anything, although often requested; but wantonly, maliciously and negligently permitted the continuance down to the first of May, when the rent became due, of the injurious acts complained of. It presents, therefore, a very different state of facts on the merits. The case referred to is not in point on the question here considered, in my judgment, although it shows an eviction to have resulted from acts of the landlord that were neither wanton nor malicious, and although he essayed to obviate their injurious consequences. Here, however, the plaintiff acted wantonly and maliciously. He knew of the disturbance complained of, and made no effort to remove or prevent it. On the contrary, he wantonly permitted it to continue, and acknowledges not only that he did so, but that the defendant, his tenant, in consequence thereof, was compelled to abandon the premises and lose the benefit of his renewal. The defendant did not abandon the premises during the quarter, but he did during the continuance of the disturbance, which had not ceased, but was still kept up, down to the time of such abandonment, wantonly and maliciously; and hence the conclusion, in my opinion at special term, that the rent in cases like the present is suspended only during the continuance of the acts complained of, unless the tenant abandon the premises whilst they continue and *before* the rent accrues, in which case they become a bar. It follows, from this, that if the disturbance cease before the rent becomes due and while the tenant is still in occupation, the rent may be recovered; and, with equal propriety, that if the disturbance continue during the whole period of a part of the term during which rent accrues and down to the time the rent becomes due by the agreement, the rent cannot be recovered, inasmuch as his right to abandon continues down to the very moment he does so, and more especially, as in this case, where he abandons the premises and a term thereof.

For these reasons, I think the judgment at special term should be affirmed.

Judgment reversed.

**CHAUNCEY W. MOORE and others v. WILLIAM WARD and others.**

Where a party, without consideration, accepts a draft with a conditional understanding that it is to be used for a special purpose, in its application to which purpose he has some interest, and it is converted to a different purpose, he is not liable upon it except to an innocent holder, who has taken it before maturity, and given a good consideration for it. But if the acceptor receives a full consideration for his acceptance, he is liable thereon to the holder, and it is immaterial what use was made of the draft by the drawer, or whether the holder has paid value therefor or not.

W. accepted certain drafts of the R. R. V. U. R. R. Co., upon the agreement that they should provide funds to take them up as they matured. The company at the same time pledged with W. bonds to an amount, at their par value, exceeding the drafts, upon the agreement that W. might sell them without notice, and reimburse himself the amount of his acceptances if they were not provided for by the company pursuant to their contract, and might use them in the *interim*, provided he would supply their place with similar bonds, upon the company's paying the drafts before maturity. The drafts were to be used upon an uncompleted part of the company's route. *Held*—

- I. That the acceptance was not an accommodation acceptance by W., but was one for value.
- II. In the absence of any evidence, as to W.'s use of the bonds, or of any loss to him thereon, it was immaterial that the company used the acceptances for a different purpose than that for which they were intended to be used; and it was immaterial whether the holder, an indorsee, paid value for them or not.
- III. That evidence of W. being interested in the completion of the railroad was irrelevant, and properly excluded.

**APPEAL** by defendants from a judgment entered on a verdict of a jury. This action was brought upon an acceptance of the defendants, drawn by The Rock River Valley Union Railroad Company for \$1,000, accepted by the defendants, and indorsed to the plaintiffs. The cause was tried before Judge Ingraham and a jury. The draft having been read in evidence, the plaintiffs rested. The defendants then offered evidence of the following facts: That the draft was one of eight of an aggregate amount of \$21,675.43, drawn by the Rock River Valley Union Railroad

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Company on the defendants, and accepted by them. To show the agreement under which these drafts were accepted by the defendants, they introduced, in evidence, the following letters, written by the president of the Rock River Valley Union Railroad Company to them:

"Office Rock River Valley Union Railroad  
Company, No. 18 Exchange Place.  
"New York, August 25th, 1853.

"Messrs. Ward Brothers & Co.,  
New York.

"Gentlemen,—The Rock River Valley Union Railroad Company may have occasion to draw on your house from time to time in sums to suit, amounting in all to \$10,000 or \$15,000, at 60 days' date, for use on the Janesville end of the road; and in case any drafts should be drawn for that purpose by me, I crave due honor on presentation, of which due advice will be given you, charging your usual commission for accepting; and for my drafts so drawn, I agree to deposit with you bonds of the city of Janesville, at a margin of 15 per cent as collateral security, and to place you in funds at least three days before the maturity of my drafts, otherwise you are to avail of the said bonds for your reimbursement without further notice.

"Respectfully yours,  
"A. HYATT SMITH, Pres't.

"Approved—R. J. WALKER, *Director and Trustee.*

"In accordance with the above I beg to advise my draft in favor of A. Hyatt Smith, Aug. 8th, 90 days, which please honor for \$1,700."

"New York, Sept. 28, 1853.

"Messrs. Ward Brothers & Co.

"Gentlemen,—It is the desire of the company to extend the amount stipulated in the annexed letter, to an amount not exceeding in all twenty-two thousand dollars, upon the same terms

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therein set forth, and have to request you to honor my drafts in conformity.

“Respectfully yours,

“A. HYATT SMITH, Pres. R. R. V. U. R. R. Co.”

“Herewith you will receive 23 bonds of the city of Janesville, for \$1,000 each, to be held by you as collateral in accordance with the terms of the letter, and the receipt to be given by you to show more fully the nature of the transaction.”

To this letter was attached a list of the drafts drawn by the railroad company on the defendants, among which was the acceptance in suit.

The defendants also introduced in evidence the following receipt given by them to the company :

“New York, September 28th, 1853—Received from A. Hyatt Smith, Esq., President R. R. V. U. R. R. Co., twenty-three of 8 p. c. city of Janesville bonds of the par value of one thousand dollars each, as collateral security for his several drafts accepted by us (as advised), under his letters to us of the 25th August, and September 28th, as follows:

[Here follows a list of drafts including the draft in suit.]

“Said bonds are numbered as follows:

1 a 9 . . . 9	61 a 68 . . . 8
47 a 50 . . . 4	72 & 75 . . . 2
Total . . . . .	23

“In case of non-fulfillment on the part of said company to place us in funds in accordance with the above-mentioned letters, authority has been given to sell the said bonds for reimbursement, without further notice; and their consent given us to use, transfer or hypothecate the same in the mean time at our option, we being required, on payment or tender of the amount of said drafts at any time before said drafts mature, or bonds shall have been sold, to return to said company an equal quantity of said bonds, and not the specific bonds deposited.

“WARD BROTHERS & Co.”

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No evidence was offered by the defendants as to what had been done with the bonds referred to in this receipt, or as to their value.

The defendants offered to prove that, on the upper or Janesville end of the road, the line was entirely uncompleted; that the other end was partially completed; and that the defendants were creditors, as mortgage bondholders and otherwise, of the company to the amount of over \$100,000 at the time the agreement above described was made. This evidence was objected to and excluded by the judge. It further appeared that the draft was passed by A. Hyatt Smith, President of the Rock River Valley Union Railroad Company, to the firm of H. O. Clark & Co., of which firm he was a member, as part of the capital which he had agreed to invest in that firm, and that it was passed by them to the present plaintiffs, by whom it was applied on a debt due to them from H. O. Clark & Co., but whether it was in absolute payment and discharge of the debt did not very distinctly appear. On this evidence the judge directed the jury to find a verdict for the plaintiffs, and judgment having been perfected on the verdict which was rendered pursuant to this direction, the defendants appealed.

*P. T. Woodbury*, for the appellants. I. To warrant an unqualified direction at the trial in favor of either party, the facts claimed to have been proved by the party against whom the direction or instruction is given must be undisputed. *Rich v. Rich*, 16 Wend. 676; *Dwyer v. Sowzer*, 6 ibid. 437; *Crawford v. Wilson*, 6 Barb. 518.

II. The facts proved constituted a perfect defence to the action, and the court erred in instructing the jury that, on the evidence, the plaintiffs were entitled to recover.

1. The plaintiffs did not take the draft in the regular course of trade, and were not holders thereof for value. Receiving paper on account of a pre-existing debt, even when received as so much payment, is not receiving it for value, or in the regular course of trade. *Coddington v. Bay*, 20 Johns. 651; *Payne v.*

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*Culler*, 18 Wend. 605; *Stalker v. McDonald*, 6 Hill, 98; *Roosa v. Brotherson*, 10 Wend. 85; *Holbrook v. Mix*, 1 E. D. Smith's R. 159.

2. The acceptance by a creditor of a bill or note of a third person, even when not indorsed by the debtor, never operates as a satisfaction of a precedent debt, unless it is expressly shown that such at the time was the understanding, even although a receipt is given acknowledging the bill or note to have been received as payment in full. *Noel v. Murray*, 1 Duer, 888; *Munroe v. Hoff*, 5 Denio, 362; 1 Smith's Leading Cases, 256, note; *Porter v. Talbot*, 1 Cow. 359; *Raymond v. Merchant*, 8 ibid. 147; *Burdick v. Green*, 15 Johns. 247. And see *Fulton Bank v. Phoenix Bank*, 1 Hall Sup. Ct. R. 574.

3. If the plaintiffs are not holders in the regular course of trade, and for value, the defendants can set up, as against them, the same defence which they could against the drawers or payees, viz.: a fraudulent diversion of the draft from the purposes stipulated between the drawers and acceptors when it was accepted. *Wardell v. Howell*, 9 Wend. 172; *Brown v. Taber*, 5 ibid. 566; *Small v. Smith*, 1 Denio, 583; *Ontario Bank v. Worthington*, 12 Wend. 593.

III. The court erred in refusing to receive evidence of the special interest of the acceptors in the completion of the Janesville end of the road.

*F. E. Mather*, for the respondent. I. There being no conflict of testimony, it was the duty of the judge to charge as he did.

II. Defendants showed nothing impeaching the plaintiffs' title as *bona fide* holders of the acceptance.

1. The plaintiffs received it for a valuable consideration in the usual course of business, before maturity, and without notice of any defect of title or consideration. *Story on Bills*, § 192; *Story on Prom. Notes*, § 195 and note; *Frisbe v. Larned*, 21 Wend. 450; *St. John v. Purdy*, 1 Sandf. S. C. R. 9; *Seneca Co. Bank v. Neass*, 3 Comst. 442; *Youngs v. Lee*, 18 Barb. 187.

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2. The parties who transferred it to the plaintiffs so received it, and plaintiffs are entitled to all the benefit thereof. Same authorities; *White v. Springfield Bank*, 3 Sandf. S. C. R. 222; *Bank of St. Albans v. Gilliland*, 28 Wend. 311; *Bank of Satina v. Babcock*, 21 ibid. 499; *Mohawk Bank v. Carey*, 1 Hill, 518.

III. The acceptance was not an accommodation one, nor made without consideration.

1. Defendants agreed to receive a commission for accepting.

2. They also had a deposit of negotiable eight per cent. bonds to the amount of \$23,000, as a further consideration for the acceptance. Byles on Bills, p. 177; Story on Bills, § 183; *Cameron v. Chappel*, 24 Wend. 94; *Dow v. Schutt*, 2 Denio, 621.

3. The bonds were not merely received as collateral security, but were in law exchanged with defendants for the acceptance.

IV. Defendants did not show any fraudulent diversion of the draft. No proof was given that it had not effected the substantial purpose for which it was made and accepted.

V. The evidence offered by the defendants, and excluded, was insufficient, if not irrelevant.

DALY, J.—Nothing had been established on the part of defendants to render it necessary for the plaintiffs to show that they were holders for value. The defendants accepted the draft in pursuance of an agreement between them and the drawer, by which they received certain bonds to the par value of \$23,000, on condition that they would accept drafts for the railroad company, of which the drawer was the president, to an amount not exceeding \$22,000. They accepted drafts to the amount of \$21,675.48, the last acceptance being three of \$1,000 each, one of which was the draft in suit. By the terms of this agreement the drawer was to place them in funds to meet their acceptances at least three days before they became due, or the defend-

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ants were to be at liberty to sell, hypothecate, or transfer the bonds, to reimburse themselves. There was, therefore, no want of consideration, but, presumptively, a full and adequate consideration for their accepting the draft in suit; and before they could impeach or inquire into the title of the plaintiffs it was necessary for them to show a want of consideration at the time the draft was accepted, or a subsequent failure of consideration. The par value of the bonds when they were placed in the hands of the defendants was equal to the amount to which the defendants accepted, including the draft in suit; or if they were not of that actual value, or afterwards fell in value, and proved insufficient to secure the defendants to the amount of their acceptances, it rested with them to show it, which they did not. The court was, therefore, justified in concluding that they had received a full consideration for accepting the draft; and if they had, then it was wholly immaterial whether the plaintiffs had given value for the draft or not; as the holders, they were entitled to recover it.

It is urged that the acceptance of the defendants was for a special purpose; that the amount for which they agreed to accept was to be used on the Janesville end of the road, and that the draft in suit was used by the drawer for a different purpose—having been given by him, to the plaintiff, for an antecedent debt. But if they received a full consideration for accepting it, it is wholly immaterial what use was made by him of the draft. Where a party, without consideration, accepts a draft with a condition and understanding that it is to be used for a special purpose, in its application to which purpose he has some interest, and it is converted to a different purpose, he is not liable upon it, except to an innocent holder, who has taken it before maturity, and given a good consideration for it. But the defendants are not in this position. They offered to show that when they made the agreement above referred to, they were creditors of the railroad company, as mortgage bondholders, to the amount of \$100,000, and that the Janesville end of the road was not completed; with a view, it is to be presumed, of showing that they were interested in the

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amount of the draft being applied to the purpose for which it was drawn. But this evidence, if it had been admitted, would not have changed their position, and brought them within the rule referred to. The inducement to the acceptance of this draft, and of the other drafts included in the agreement, was not that the defendants were creditors of the company, but it was a distinct consideration, the placing of securities in their hands sufficiently ample to cover them to the extent of their acceptances. It was, therefore, a transaction entirely distinct and separate. Even if it had been shown that the sale or hypothecation of these securities had the effect to lessen the value of the other bonds of the company mortgaged to the defendants, it would not relieve them from their liability upon these acceptances to the holders of the drafts, whether the holders had given value for them or not. But whether it would or not, nothing of this kind was attempted to be shown. As the case stood before the court, they had received a full consideration for the acceptance of this draft; they were bound to pay it, and had no right to call upon the plaintiffs to show that they had taken it for value.

But, if I deemed the point essential to the determination of this case, I could not agree with the other members of the court, that the plaintiffs are holders for value, so as to give them a right to recover upon a draft accepted without consideration, and diverted from the purpose for which it was accepted. In the courts of the United States, and in several of the states, the circumstances under which this draft was taken by the plaintiffs would be sufficient to make them holders for value. In this state, however, I understand the law, as settled, to be otherwise; but my reasons for so thinking would require an extended and careful examination of the course of our judicial decisions, which it is unnecessary that I should go into, as we all agree that the judge was right in telling the jury that, upon the evidence, the plaintiffs were entitled to recover.

**JOHN G. WILLIAMS v. THE INSURANCE COMPANY OF NORTH AMERICA.**

A part-proprietor of a vessel had agreed with one of his co-proprietors for a sale of his interest to the latter; and by the agreement the purchaser agreed to give a bill of sale of his own interest in the vessel as security for the performance of the agreement upon his part. The seller subsequently applied for and obtained an insurance on the freight, and, a loss occurring, brought an action on the policy. It did not appear clearly what had been done under the agreement of sale; whether the purchaser had executed the stipulated bill of sale or not. The interest of the purchaser in the vessel had been sold on execution.

*Held.*—1. That, upon the construction of the agreement, it was evidently not the intention of the parties that the interest to be sold should pass, unless the purchaser transferred his interest in the vessel as security.

2. That, there being no evidence that the agreement had been fully performed on both sides, a jury were warranted in inferring that at the time of loss the plaintiff had an interest, either as proprietor of his own original share, or as mortgagee of the interest of the purchaser, which could not be affected by the sale on execution.

3. That it was immaterial (the policy being a valued policy) what was the extent of plaintiff's interest; but either interest above named would enable him to maintain the action.

The presumption is, that freight belongs, as the earnings of the vessel, to the owners.

When a verdict is taken subject to the opinion of the court, the court will draw, in support of the verdict, every inference from the evidence which a jury would be justified in drawing.

MOTION by plaintiff for judgment on a verdict taken subject to the opinion of the court at general term. This action was brought upon a policy of insurance upon freight of merchandise, laden or to be laden on the propeller General Warren, owned by plaintiff. The question in the case was, whether plaintiff had an insurable interest at the time of the loss? The facts, so far as this question is concerned, were as follows:

In August, 1850, John G. Williams, the plaintiff, was owner of one-eighth of the propeller General Warren, and Nathaniel Dole was owner of five-sixteenths of her. On the 7th of August Williams and Dole entered into an agreement, in writing, where-

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by, among other things, Williams agreed to sell, and Dole to buy Williams' eighth of the vessel, for \$10,000, payable in two equal payments, on the first days of January and February, 1851. And Dole agreed, among other things, to give Williams a bill of sale of his five-sixteenths of the vessel as security for the fulfilment of the agreement on his (Dole's) part, and also to assign his interest on the policies of insurance on the steamer; and also to effect policies of insurance on freight of the steamer, to the amount of \$10,000, and assign them to Williams. By the further terms of this agreement, Dole agreed that, in case he should make default in any of the payments promised in the agreement, then the title vested in Williams by the deposit of the aforesaid securities should ever remain so vested, and Dole should forfeit all claims thereto. And Williams agreed that, in case Dole should make the payments agreed on, then Williams should reconvey to him all interest in the securities in question; and that, meantime, he would not interfere in the management of them, except in case of default in payment by Dole.

In June, 1851, the plaintiff applied to the defendants for insurance on the freight of the General Warren, and the policy in suit was issued. It was dated June 5, 1851, and insured \$5,000 on the freight of the vessel, for one year from April 26, 1851. The freight was valued therein at the sum insured, carried or not carried; and it was agreed that the policy should be proof of interest. The loss, if any, was made payable to the plaintiff.

Early in 1852, and before the loss of the propeller was known at New York, the plaintiff stated to the agent of the defendants that the interest of the parties to whom he sold the vessel had been sold out by the sheriff, or marshal, in San Francisco. The agent thereupon remarked that he had no further insurable interest, and had better cancel the policies, and accept a return of part premium. The plaintiff thereafter brought in the policy upon the vessel, and it was canceled; but he declined to cancel the policy on freight, saying he would retain it—it was all he had left to depend upon of the General Warren.

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The vessel was lost in the Columbia River in January, 1852, by the perils insured against, being full freighted at the time.

Upon these facts the counsel for defendants moved, at the trial, to dismiss the complaint, chiefly upon the ground that the interest of the original assured in the vessel was divested prior to the voyage in which the loss was alleged to have taken place, and there was no evidence of any privity between the new proprietors and the plaintiff, nor of any freight contract commenced before the divesting the plaintiff's interest; and that the plaintiff therefore could not recover.

The judge reserved the question raised by defence, and directed a verdict for the plaintiff, subject to the opinion of the court.

*F. B. Cutting*, for the plaintiff.

I. The plaintiff had an insurable interest in the freight of the steamer at the time of effecting the policy, and at the time of the loss. He was to have been paid out of the earnings.

The character of his interest was explained to the defendant, and the policy was framed for the express purpose of covering it.

The policy stipulated that its production should be sufficient proof of interest in the plaintiff.

He was mortgagee of the steamer, and the mortgage debt was to have been paid from her earnings. 9 S. & R. 108; *Lucena v. Crawford*, 5 Bos. & Pul. 269, 302; *Hancox v. Fishing Co.*, 3 Sum. R. 132, 140; 1 Arn. Ins. 229.

II. The interest of the plaintiff continued until the loss of the steamer. There is no evidence that he had sold or parted with his interest; and, on the contrary, it appears that the policy on the freight was all he had left to depend upon.

III. The sale by the sheriff of the right, title, and interest of Dole, the mortgagor, even assuming that there is legal evidence that his title was divested (which is denied), could not affect or impair the insurable interest of the plaintiff, or deprive him of

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the right to enforce a contract of insurance made for the express purpose of protecting that interest.

*D. Lord*, for the defendants.

I. The policy in suit was only for the benefit of the plaintiff and his vendee, Dole, and rested upon the interest of the latter in the freight. *Phil. on Ins.* 211, §§ 279, 282, 388; *Baudy v. Union In. Co.*, 2 Wash. C. C. R. 391; *Seaman v. Loring*, 1 Mason R. 136.

Dole, being in possession as vendee, was responsible for expenses, and while so was entitled to freight; and this, being the only real interest, is to be deemed that which is admitted by the policy, and to which alone it attached. Even if the plaintiff had been entitled to resume possession of the vessel, at the time of her sale in San Francisco, in the fall of 1851, he had no interest in her freight, which was the fruit of a contract by the new owner, his expenditures and liability, with no obligations between him and the plaintiff as to the freight.

II. The expression in the policies, "for whom it may concern," does not embrace any parties but those interested at the time of effecting the policy, and on whose behalf it was made. (Authorities under first point.)

III. The interest insured must continue in the same parties until the time of the loss: otherwise the interest insured is not the interest which suffers the loss. *1 Arn. on Ins.* 281, 2; *1 Phil. Ins.* 62, §§ 85, 87; *Powles v. Jones*, 11 Mees. & Wels. 10.

As in this case, by the sale, the plaintiff and his vendee, Dole, ceased to be entitled to the freight contemplated in the policy; and, whether earned by the safe performance of the voyage, or lost by its defeat by wreck, it was the same to them; they would not be entitled to it in either case. They cannot, therefore, get it from the insurers.

IV. To allow a recovery on an insurance after the insured had ceased to have any interest, is, in effect, to make the policy a wager and not an indemnity against the perils insured against. The insurers, if made liable now, are made to indemnify the

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plaintiff, not only against the perils of the sea, but against judgments and executions against his vendee—in all respects contrary to the principles of the contract of insurance.

DALY, J.—It was admitted upon the trial that the vessel had been lost by the perils insured against, and that the policy was not a wager policy ; the question therefore is, whether the plaintiff had an insurable interest in the freight when he effected the policy and at the time of the loss, or if he had an interest in the freight when he effected the policy, was it put an end to by the sale of Dole's interest in the vessel by the sheriff, or marshal, in San Francisco ?

If Dole executed the bill of sale, which by the agreement he bound himself to do, as security for the performance of the agreement on his part, then the legal title to five-sixteenths of the vessel was in the plaintiff, subject to be divested by the performance of the agreement by Dole ; and if Dole did not execute the bill of sale, then the plaintiff's interest in the one-eighth of the vessel did not pass to Dole, for it is apparent, upon the construction of the whole agreement, that it was not the intention of the parties that that interest should pass, unless Dole transferred to the plaintiff his title to the five-sixteenths of the vessel as security—a title which was to vest in the plaintiff absolutely if Dole failed to make the payment according to the terms of the agreement. It did not appear positively what had been done under the agreement: whether the plaintiff had loaned the sums he agreed to loan, or whether Dole had given the bill of sale; but, from the declarations of the plaintiff, a jury would have the right to infer that the plaintiff had a claim upon the freight, either for money advanced under the agreement, which had not been repaid, or by virtue of his title as owner, which had not been divested by the failure of Dole to comply with the conditions of the agreement. There was no evidence in the case that would warrant them in coming to the conclusion that the agreement had been fully performed in all its parts, so as to divest the plaintiff of all interest in the vessel, and of all claim upon her earnings, when

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the vessel, or Dole's interest in her, was sold at San Francisco; and if they could not come to that conclusion, then there was proof before them that the plaintiff had an interest as owner, whether in one-eighth or in five-sixteenths was immaterial, which could not be affected by the sale of Dole's interest. When the vessel was lost, she had a full freight on board, and if it had been earned, it must be presumed, as there was no evidence that any one else was entitled to it, that it belonged, as the earnings of the vessel, to the owners.

When a verdict is taken subject to the opinion of the court, every inference which a jury would be justified in drawing from the evidence, the court will draw in support of the verdict; and the evidence warrants the conclusion, that the plaintiff, when the vessel was lost, had an interest in her as owner, and, as one of the owners, an insurable interest in the freight, which was valued by the policy. The plaintiff is, therefore, entitled to judgment for the amount of the verdict—\$6,414.58.

Judgment accordingly

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**EDWARD TRACY, assignee of James Wiley, v. HERMAN HARTMAN.**

This court will not interfere, on appeal, with the finding of a justice, unless it is such an obvious disregard of the weight of evidence as to create a conviction that it must have proceeded from passion, prejudice, corruption, or palpable mistake. The justice returned that the testimony of two of the defendant's witnesses was given in a manner to deprive it of any weight, and this court refused to disturb the judgment, although, from the testimony returned, it probably would come to a different conclusion as to the facts from that arrived at by the justice.

**APPEAL by defendant from a judgment of the Second District Court.**

The action was brought to recover for ale sold and delivered to the defendant by the plaintiff's assignor. The sale and delivery, and amount due therefor, were proved by the testimony

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of the plaintiff's assignor, corroborated by that of D. C. Fuller. On the part of the defendant two witnesses were called, whose testimony tended to show that the quantity delivered was less than claimed by plaintiff, and that defendant paid cash for all ale purchased.

The justice rendered judgment for the plaintiff, assigning as a reason, in his return, that, as the testimony was presented to him, he thought that of the plaintiff's assignor, corroborated as it was, entitled to greater credit than that of defendant's witnesses.

*George Carpenter, for the appellant.*

*Stillwell and Swain, for the respondent.*

DALY, J.—We have repeatedly held, that where the testimony is conflicting we will not interfere with the finding of the justice, unless we can come to the conclusion that the finding is such an obvious disregard of the weight of evidence as to create conviction in the mind of the appellate court that it must have proceeded from passion, prejudice, corruption, or palpable mistake. Such is not the present case. It was a case of contradictory testimony, involving the relative credibility of witnesses, a question which the justice, before whom the witnesses testified, was alone competent to pass upon. He has returned that the conviction made upon his mind was, that the testimony of the plaintiff's assignor was more reliable than that of the defendant, and that the testimony of two of the defendant's witnesses was given in a manner to deprive it of any weight. In such a case we will not interfere. We might, from the testimony as it is returned to us, draw a different conclusion, as to the facts, from that drawn by the justice, but that would not warrant us in reversing his judgment. The tribunal, whether it be a judge or a jury, before whom a question of fact is tried, upon conflicting testimony, is the one most competent to pass upon it; and a conclusion arrived at by such a tribunal is not to be disturbed, unless in case of obvious mistake, passion, prejudice, or corruption.

Judgment affirmed.

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*Irwin v. Lawrence.*

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**MARGARET IRWIN v. GEORGE W. LAWRENCE and JAMES MUIR.**

Where a judgment is reversed, upon appeal, at the general term of the Marine Court, for errors occurring upon the trial before a single judge, or for insufficiency of proof, a new trial should be awarded.

It is only in cases where the facts involved in the action are ascertained at the trial, either by special verdict or in some other proper mode, that a final judgment may be given, at the general term, in favor of the party appearing to be entitled thereto, and adverse to the judgment appealed from.

**APPEAL** by the plaintiff from a judgment of the general term of the Marine Court, reversing a judgment in her favor given upon a trial before a single judge of that court.

The general term reversed the judgment without further directions in respect to any future proceedings in the action.

The return did not show that the facts involved in the action were specially found or ascertained in any way, and besides it appeared presumptively that the reversal was based upon errors of the judge in the admission of evidence at the trial.

*Warren G. Brown, for the appellant.*

*William McDermot, for the respondents.*

**BRADY, J.**—The plaintiff recovered a judgment at the special term of the Marine Court, from which the defendants appealed to the general term of that court. The general term reversed "the judgment, with costs." It should have ordered a new trial. *Astor v. L'Amoreux*, 4 Selden, 107. It is said in a later case (*Marquat v. Marquat*, 2 Kernan, 340), that where the facts are ascertained upon the trial, either by special verdict or any other form of finding allowed by law, the general question, which party is entitled to judgment? arises upon appeal; and in such cases a judgment disposing of the whole cause may be given at a general term, notwithstanding such judgment be adverse to that of the special term. But when the case is brought for re-

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Townsend v. Billinge.

view to the general term, upon an allegation of error in the trial—in the process of ascertaining the facts—the only judgment which can be properly given for the appellant is one ordering a new trial.

Several objections were taken on the trial of this case at the special term, and the argument submitted by the respondents shows that the appeal was predicated upon an allegation of error at the trial. No special finding appears to have been made, and the judgment of the general term may have been founded upon the insufficiency of proof on the trial. If such was the fact, a new trial should have been ordered. Reversing the judgment, with costs, might, in some cases, be regarded as giving judgment for the defendant, which the general term, as we have seen, should not have done.

Judgment of the Marine Court reversed, and a new trial ordered.

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#### GEORGE TOWNSEND v. HENRY S. BILLINGE and WILLIAM T. JONES.

The production of a check, drawn payable to "bearer," upon the trial, is sufficient *prima facie* evidence of title, to enable the plaintiff to recover upon it.

APPEAL from a judgment of the general term of the Marine Court. The action was brought on a check, alleged to have been drawn by defendants under their firm-name of Billinge & Jones, on the Importers' and Traders' Bank, for \$400, which was averred to have been "duly delivered" to plaintiff before maturity, and to have been presented at maturity, but payment refused, of which defendants had due notice.

Billinge alone was served with process. His answer admitted the partnership at the date of drawing the check, but denied that the defendants made the check, or that it was duly delivered to the plaintiff, or that plaintiff was the lawful owner and holder thereof.

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*Stanley v. Koehler.*

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Upon the trial, it appeared that Jones signed the check in the firm-name, and got it cashed by one Terhune, a broker. No assignment or delivery of the note to the plaintiff was proved. The plaintiff, however, produced the check upon the trial. The defendant's counsel moved to dismiss the complaint, upon the ground that there was no proof of ownership in the plaintiff. The court overruled the motion, and rendered judgment for the plaintiff. Defendant appealed to the general term, where the judgment was affirmed, and he now appealed from the judgment of the affirmance.

*C. W. Sanford*, for the appellant, contended that plaintiff was bound to prove affirmatively the transfer and delivery to him. *The Bank of Geneva v. Gulick*, 8 How. Pr. R. 51; *Parker v. Totten*, 10 ibid. 283; 4 Sandf. S. C. R. 696.

*Frederick G. Burnham*, for the respondents.

**DALY, J.**—The check was payable to bearer, and was therefore transferable by delivery. The answer merely averred that the plaintiff was not the lawful holder or owner, and the production of the check upon the trial, in the possession of the plaintiff, was *prima facie* evidence of transfer and title. It was proved that the check was signed on the 6th of Nov., 1856, and admitted by the answer that the defendants were then partners.

The plaintiff was entitled to recover, and the judgment should be affirmed. *James v. Chalmers*, 2 Selden, 209 and 214.

Judgment affirmed.

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#### HENRY STANLEY v. CHARLES KOEHLER.

Where a landlord, being informed of his tenant's intention to remove from the demised premises on a certain day, gave him permission to leave some of his prop-

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Stanley v. Koehler

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erty on the premises after the day named—*Hold*, that giving such permission was evidence from which an acceptance of a surrender of the premises might be presumed; and that no rent could accrue thereafter.

APPEAL from a judgment of the Sixth District Court. The action was brought to recover rent of certain premises consisting of lofts with steam power, hired by the defendant of the plaintiff. The hiring was from October to the first of May following. The steam-power furnished was not sufficient for defendant's purposes, and on this account he removed from the premises about the 1st of December.

It appeared on the trial that three days before defendant's removal, he sent word to the plaintiff that he was about to remove, and that plaintiff said he was sorry, for he must then ~~get~~ some other person to hire his power. The plaintiff also admitted that he gave defendant the privilege of leaving some of his property on the premises for a few days after the 1st of December.

The justice rendered judgment for the plaintiff and defendant appealed.

*Diefendorf and Aikin, for the appellant.*

INGRAHAM, FIRST JUDGE.—I think the evidence shows a surrender on the 1st December with the plaintiff's assent.

The plaintiff admitted on the trial, that, when he was informed of the defendant's intended removal on the first of December, he said he should have to get some one to hire his power, and gave the defendant permission to leave some of his property on the premises after that date. Giving such permission is evidence from which an acceptance may be presumed, and if so, no rent could accrue thereafter.

The justice erred in rendering judgment for the plaintiff.  
Judgment reversed.

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*Cushman v. Gori.*

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**ALONZO CUSHMAN, assignee of John S. Kelso, v. OTTAVIANO GORI.**

In an action to recover for services as broker, in selling land of defendant, it appeared that the purchaser saw the lot with the defendant's name posted upon it, and upon an adjoining lot the name of the plaintiff's assignor, who is a broker. He took down the address of both; and calling first upon the broker, the latter, without any authority, offered to sell him the lot in question. The broker subsequently procured authority from the wife of defendant to sell the lot for \$5,000; but, before he had any further negotiation with the purchaser, the latter negotiated a purchase from the defendant himself at \$4,500.

*Hold,* that the broker had done nothing to entitle him to any commissions.

**APPEAL** by plaintiff from a judgment of the Third District Court. This action was brought to recover \$100 for services alleged to have been rendered to defendant by the assignor of the plaintiff, as a broker, in negotiating the sale of a lot of land in New York city, owned by defendant, to one Kerr. The evidence in the cause is sufficiently stated in the opinion of the court. The justice rendered judgment against the claim, and the plaintiff appealed.

*Justus Palmer,* for the appellant.

*S. W. & R. B. Roosevelt,* for the respondent.

**DALY, J.**—The amended return presents a state of facts which would warrant the justice in concluding that Kelso had nothing to do with effecting the sale of the lot to Kerr. Kerr saw the lot in question with Gori's name and address on it, which he took down, intending to see Gori about it. He at the same time saw other lots, one of which adjoined the lot in question, which had Kelso's address on them, which he took down, intending to see him also. He called on Kelso first, and Kelso, who then had no authority, offered to sell the lot in question for \$5,000; but Kerr made him no offer, intending to see Gori. Some

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Jackson v. Purchase.

months afterwards Kelso called on Mrs. Gori, and was told that Gori would sell the lot, and that the price was \$5,000. Kelso offered, if she would agree to give him \$100, to sell the lot, which she agreed to do. He never saw Kerr after that. But Kerr called on Mrs. Gori, learned who was the owner of the lot, and bought it from him for \$4,500. It is plain upon such a state of facts, that Kelso had nothing to do with effecting the sale of the lot, and the justice, upon the evidence, was right in so concluding.

Judgment affirmed.

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JOHN C. JACKSON v. JOHN PURCHASE.

Leave to appeal to the Court of Appeals, from a judgment of this court, in an action commenced in an inferior court, will only be granted where the case involves great interests, or settles a principle of law affecting the decision of numerous other cases.

MOTION for leave to appeal to the Court of Appeals, from a judgment of this court affirming a judgment of the Marine Court.

The grounds of the decision of the court upon the motion sufficiently appear in the opinion.

*G. & T. Stevenson*, for the motion.

*Olcott and Briggs*, opposed.

INGRAHAM, FIRST JUDGE.—The defendant moves for an order of the general term of this court, allowing an appeal to the Court of Appeals in this case. The action was originally in the Marine Court, and judgment was first given for the plaintiff, which judgment was affirmed by the general term, and has been again affirmed in this court. The defendant has had three hearings;

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and although, by the late amendment of the Code, power is given to this court to allow another appeal, yet it does not follow that such power should be exercised in all cases, even though questions of law should be involved. An examination of ordinary questions of law, where the decisions throughout of three tribunals are uniform, ought to be sufficient, except in a case involving great interests, or settling a principle of law on which numerous other actions are to be decided. No such exception exists in this case, and we see no reason for granting this motion. We are the more strengthened in these views because we entertain no doubt of the propriety of the judgment in the court below, or its affirmance by this court.

~~The~~ The motion must be denied, but, as the question is new, without costs.

Ordered accordingly.

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**ANDREW GARR, assignee of John Patten, jr., v. JOHN M.  
MARTIN.**

It is settled in this state, that an action will lie to recover back money paid upon a judgment which is afterwards reversed.

A defendant, against whom judgment had been recovered, sued out a writ of error, giving a bond with sureties for costs, &c., if the judgment should be affirmed. The judgment was affirmed by a state court, and one of the sureties paid to the plaintiff the amount due on the bond. Thereafter the judgment was reversed by the Supreme Court of the United States.

*Held*, that the surety, or his assignee, might maintain an action directly against the plaintiff in the original judgment, to recover back the sum paid.

There is a privity, arising on the bond, between the surety and the plaintiff in the judgment, sufficient to sustain the action, without putting the surety to an action against his principal, and the principal to an action against the plaintiff.

The right of action in such a case is founded upon a payment, the consideration of which having failed, an implied obligation arises, on the part of the party having received the money, to restore it to the party from whom he received it; and no equities existing between the plaintiff and the defendant could affect the right of the surety to recover back the payment.

## Garr v. Martin.

To render a payment compulsory, in such a sense as entitles the party to bring an action to recover it back, it is not necessary that the party making it should wait till judgment has been recovered and execution issued: it is sufficient if the payment, when made, could have been compelled at law.

**APPEAL** by defendant from an order of the special term overruling a demurrer to the complaint. The action was brought by Andrew Garr, as assignee of John Patten, jr. The complaint alleged that, at the time of the assignment by Patten to the plaintiff, the defendant was indebted to Patten in the sum of \$158.59, money had and received by defendant to the use of Patten under the following circumstances: That Patten, together with Cornelius Kanouse and Thomas P. Hart, executed a bond to defendant, dated April 30, 1846, for \$150, conditioned, ~~that~~ if, on a writ of error sued out by Kanouse in the Supreme Court of the state of New York against Martin, on a judgment recovered by Martin against Kanouse, for \$421.63, in the New York Common Pleas, the judgment should be affirmed, &c., &c., then Kanouse should pay the costs and damages awarded on said writ of error. That the writ of error was afterwards duly transferred to the New York Superior Court, to be determined by that court. That the Superior Court, in May, 1850, affirmed the judgment, and awarded Martin \$320.18, for his costs and damages on the writ of error. That Martin thereafter sued Patten upon the bond above mentioned, and Patten, in order to prevent judgment and execution against him in that action, paid to Martin the amount of the penalty of the bond, with interest and costs, in all, \$158.59. That thereafter the judgment of affirmance, rendered by the Superior Court, was brought before the Supreme Court of the United States, and was by that court reversed, and the cause remanded to the Superior Court for further proceedings, in conformity to the judgment of the Supreme Court; whereupon the judgment mentioned in the bond was, by the Superior Court, reversed.

The complaint further averred an assignment of the cause of action by Patten to the plaintiff.

The grounds of the demurrer were, that the complaint did

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not state facts sufficient to constitute a cause of action in either Patten or the plaintiff.

The appellant in person.

I. There is no such privity between the plaintiff and defendant as to enable the former to maintain this action against the latter. *Ruland v. Paige*, 24 Verm. Rep. 181, 186; *Tom v. Goodrich*, 2 J. Rep. 214; *Krafts v. Creighton*, 8 Rich. 273, 275. No case can be found where a surety has been permitted to recover money paid for his principal, from any one but his principal (or some one standing in the place of his principal, as in the case of *Stephens v. Fitch*, 11 Met. 248), and his co-surety.

II. The remedy is an action against his *principal* for money *paid*. *Powell v. Smith*, 8 J. Rep. 249; *Sturges v. Allen*, 10 Wend. 354; *Elwood v. Diefendorf*, 5 Barb. S. C. R. 398, 410. Because it is paid for "*the use*" of the principal, and in satisfaction of *his* debt. *Rodman v. Hadden*, 10 Wend. 498, 502; *Buller v. Wright*, 20 J. Rep. 367; *Beardsly v. Post*, 11 J. Rep. 464; *Buller v. Wright*, 2 Wend. 369. And the surety can maintain the action against him *only*, whose legal liability is discharged. *Tom v. Goodrich*, 2 J. Rep. 213; *Krafts v. Creighton*, 8 Rich. 273, 276.

III. The right to a restitution of the money in this case vested in the plaintiff in error on the reversal of the judgment. 2 Paine & Duer's Pr., and cases cited, p. 489; Gr. Pr. p. 798, 1st ed.; *Cummings v. Noyes*, 10 Mass. Rep. 433. And no person can sue under this right except the party in whom the *title* was vested at the *time* the money was received, and his legal representatives. *Seaman v. Whitney*, 24 Wend. 260, 263. Therefore, the surety, if he would recover the money paid for his principal, must sue in his *principal's right*, and as his assignee. In that case the claim will be subject to all equities between his principal and the defendant, as of right it should be. *Colvin v. Owens*, 22 Ala. 782. But if the surety could have restitution in his own right by means of an action for money had and received, these equities could not be set up, and by this means would be *cut off* and *lost*. This will not be allowed to be done by means of this action, for

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it "will not be extended to any case where a defendant will be deprived of any right, or the benefit of any privilege, thereby." *Rathbone v. Stocking*, 2 Barb. S. C. R. 135, 146, 147.

IV. The complaint and the cases cited under the second subdivision of the defendant's second point show that the money in question was paid and received for the *use of Kanouse*, and neither the surety who paid it nor his assignee can maintain an action for it as money had and received *to his use*; because the money was received to the use of the principal. *Eaton v. Dickson*, 2 Iredell, 248; 1 Chitty's Pleading, 887; Leigh's N. P. 51, and cases cited.

V. The money paid by Patten is a *part only* of Kanouse's claim for restitution, and if Patten can maintain this action, every other person who may have given credit, advanced money, or incurred liability in the original suits, can maintain his *separate* action, and a *multiplicity* of suits would thus follow the splitting of a single claim. This would not only deprive the defendant of his *equitable defences* against Kanouse, but would subject him to *onerous costs*, and be contrary to a settled policy of the law. *Farrington v. Payne*, 15 J. Rep. 432.

VI. The payment was not made by the surety to emancipate his *person or property* from duress, and was, therefore, *voluntary*. *Mayor of Baltimore v. Lefferman*, 4 Gill. 425; *Fleetwood v. City of New York*, 2 Sandf. S. C. R. 475, 481. A *voluntary* payment, with *full knowledge of the facts*, cannot be recovered back. *Wyman v. Farnsworth*, 3 Barb. S. C. R. 370; *Supervisors of Onondaga v. Briggs*, 2 Denio, 26, 39; *Abell v. Douglass*, 4 ibid. 305; *Silliman v. Wing*, 7 Hill, 159. And a payment will be *presumed* to have been made with a *full knowledge* of all the facts, in the absence of evidence to the contrary, of which there is none here. *Peterborough v. Lancaster*, 14 N. H. 382. Besides, Patten would have been discharged by the giving of the new error bond, if he had not voluntarily paid. *Winston v. Rives*, 4 Stew. & Port. 269.

*J. B. Staples*, for the respondent.

I. The law is well settled, that an action lies to recover back

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money paid upon a judgment afterwards reversed. *Clark v. Pinney*, 6 Cowen, 297; *Maghee v. Kellogg*, 24 Wend. 82; *Stevens v. Fitch*, 11 Metcalf, 248; *Newdigate v. Dury*, 1 Lord Raymond, 742; Loft's Rep. 207-8-9.

The rule, in reason and upon principle, applies, *a fortiori*, to the case of a surety upon an error bond, having paid money upon a judgment afterwards reversed.

II. The money having been paid by Patten upon the bond in error, upon a judgment, and paid to Martin himself, in a suit by Martin against Patten, upon the reversal of that judgment, the payment became money in the hands of Martin belonging to Patten, and nobody else; and Patten (or his assignee), and nobody else, has a right of action to recover it back, as money had and received, belonging to Patten. As soon as the judgment was reversed, the money thus paid became a debt *ex aequo et bono*, and in good conscience from Martin to Patten.

III. The payment by Patten to Martin, and after the suit brought by Martin against Patten, constitutes a privity of contract, or relation of debtor and creditor, upon which Patten, and he only (or his assignee), can sue; Kanouse could not maintain an action, as he did not pay the money.

DALY, J.—It is settled, in this state, that an action will lie to recover back money paid upon a judgment which is afterwards reversed. *Clark v. Pinney*, 6 Cow. 297; *Maghee v. Kellogg*, 24 Wend. 82. In *Clark v. Pinney* it was laid down as a general proposition, that an action lies in all cases where the defendant has in his hands money which *ex aequo et bono* belongs to the plaintiff. "When money," says Chief Justice Savage, "is collected upon an erroneous judgment, which, subsequent to the payment of the money, is reversed, the legal conclusion is irresistible, that the money belongs to the person from whom it was collected; of course, he is entitled to have it returned to him." In that case the action was brought by the defendant in the judgment, from whom the money was collected upon execution. In this case it is brought by the assignee of one of the sureties,

## Garr v. Martin.

on a bond given to the defendant Martin, conditioned that the sureties would pay the damages and costs upon a judgment recovered by Martin in this court, and brought by writ of error to the Supreme Court, if it should be affirmed. The judgment was affirmed, and the plaintiff's assignee, after a suit was commenced against him by Martin on the bond, paid to the defendant Martin the amount of the bond. The judgment was subsequently reversed by the Supreme Court of the United States. The difference between the two courts constitutes no difference in the application of the principle. The judgment recovered by Martin having been finally reversed, he is not entitled to retain the money paid to him by the plaintiff's assignor. He has no title to it, but it belongs to the party from whom he received it, and to whom, *ex aequo et bono*, he is bound to restore it.

It is urged that there is no such privity between the plaintiff's assignor and the defendant as will entitle the former, or his assignee, to maintain an action against the latter. That, upon the payment of the money by the surety, he had his remedy against his principal, for whose benefit he paid it, and that he has no other remedy. That Martin, in consequence of the reversal of the judgment, may be bound to make restitution to the defendant in that judgment, but that he is not liable to restore the money to that defendant's surety. The short answer to that objection is, that there *is nothing to restore to the defendant in the judgment, for he never paid anything upon it.* *He may be liable to his surety, but that liability is discharged if what was paid by the surety is restored to him by the defendant, and to effect that object it is not necessary to turn the surety over to his action against the judgment-debtor, and the judgment-debtor to an action against the defendant.* The privity between the plaintiff's assignor and the defendant *arises from the bond.* Patten, the plaintiff's assignee, bound himself to the defendant to pay the costs and damages, if the judgment should be affirmed, and the judgment having been affirmed, he fulfilled his contract and paid the money to the defendant, upon a consideration which afterwards totally failed by reason of the reversal of the judgment.

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In *Stevens v. Fitch* (11 Met. 248), it was held that a privity of contract was implied by law, where a judgment against a defendant, which was subsequently reversed, was paid to the plaintiff by a party who had assumed the responsibility of the suit, and he was allowed to recover it back.

It is further urged that, if the surety can recover the money back, it must be on his principal's right, and as his assignee, for that otherwise any equities the defendant here may have against the defendant in the judgment would be cut off. But the right of action here is founded upon a payment, the consideration of which having failed, an implied obligation arises on the part of the defendant to restore it to the party from whom he received it, and no equities existing between him and the defendant in the judgment could possibly affect the right of the plaintiff's assignor to recover back money to which the defendant in the judgment has not, and never had, any title.

It is also insisted that the payment by Patten was not compulsory, but was a voluntary payment made under a mistake of law, and cannot therefore be recovered back. To make the payment compulsory, it was not necessary that Patten should wait until Martin had recovered judgment against him and issued execution, which would have subjected him to the costs of that proceeding. It is sufficient if the payment, when made, could have been compelled at law. If it could, he was justified in making it, without waiting to be sued, or, as the fact was, having been sued, without waiting until payment was enforced by an execution and levy. The judgment having been affirmed, his liability on the bond was then fixed, and the law would then have compelled him to pay it; and paying it then was not paying it voluntarily under a mistake of law. *Bize v. Dickason*, 1 T. R. 285; Story on Contracts, note 1, to § 407. The reversal of the judgment afterwards does not make it a payment under a mistake of law, for a clear legal liability existed, by the condition of the bond, when the payment was made, which could be enforced as long as the judgment remained unreversed. Patten discharged that liability by payment. If he had not, it

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McDonald v. Williams.

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would have been discharged by the subsequent reversal of the judgment. The effect of that reversal was, to take away the right which the defendant had acquired by the affirmance of the judgment in the Superior Court; and by the reversal Patten became entitled to receive back the money he had paid the defendant, and an obligation and duty was cast upon the defendant to return it to him.

The plaintiff is entitled to judgment upon the demurrer, and the appeal is dismissed, with costs.

Judgment accordingly.

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#### JOHN McDONALD v. DAVID WILLIAMS.

To enable the vendee of a chattel to recover damages for breach of the contract to deliver, he must prove payment or tender of the purchase money, or other performance of the contract, upon his own part.

A mere declaration of a vendor, to a third person, that he would not be able to deliver at the time agreed on, is not evidence of a breach on his part; but it might have the effect of relieving the vendee from liability for not being prepared to receive at the time appointed.

#### APPEAL from a judgment of the Sixth District Court.

The action was to recover damages for the breach of a contract for the sale and delivery of a horse by defendant to plaintiff. There was evidence tending to show that the horse was worth \$300, while the purchase price agreed on was only \$150; and the justice rendered judgment in favor of the plaintiff for \$100 damages. The evidence relied on, to show a breach of the agreement by the defendant, appears in the opinion of the court.

*John Cook*, for the appellant

**INGRAHAM, FIRST JUDGE.**—The contract alleged to have been broken was for the sale of a horse, to be delivered in the after-

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Chapin v. Potter.

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noon, at 5, P. M. The defendant was at the place of delivery ~~at~~ the hour, ready to deliver the horse, and the plaintiff was not there to accept it. The previous declaration of the defendant to a third person, that he would not be able to deliver at the time fixed, was not a breach of the contract, and, if it was entitled to any weight, could only be of use in relieving the plaintiff from liability for not being ready to receive and pay for the horse at the hour agreed on.

Under these circumstances, no breach of the contract was made out until a tender had been made, either by the defendant, of the horse, to fulfil the contract on his part, or by the plaintiff, of the money, to entitle him to damages for the non-delivery. Neither party, without doing the acts required, could maintain an action for breach of the contract.

Judgment reversed.

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#### LYMAN CHAPIN v. SAMUEL B. POTTER and ISRAEL POTTER.

It is the duty of the court to determine as to the validity and effect of a contract, whether written or parol, the terms of which are not disputed; but where the evidence in respect to its terms is conflicting or doubtful, and a question arises as to the intent of the parties to it, it must be submitted to the jury for their determination, under proper instructions from the court upon the law governing the case.

In the case of a contract for the sale and delivery of goods, it is never to be presumed, in the absence of an express agreement, that payment is to be made until the delivery of the goods purchased.

C. agreed to sell R. a lot of soap and candles, agreeing to take as part payment, in exchange, a lot of damaged candles. R. pointed out the damaged candles to C.'s clerk, and told him to send the soap and take the candles away; but before the soap had been all delivered, or the candles had been taken by C., R. failed and made an assignment.

*Held*, that the title to the candles did not pass to C., but remained in R. until the delivery of the soap was completed, and that in an action by C. to recover the value of the damaged candles from P., who purchased them from R.'s assignee, the complaint was properly dismissed.

## Chapin v. Potter.

*Rev DALY, J., dissenting.*—Where a part payment of the purchase money is relied upon, to take a parol contract for the sale of goods out of the statute of frauds, the payment must be made at the time when the contract was entered into; but a delivery and acceptance of a part of the goods takes the case out of the statute, although it takes place after the parties have agreed to the conditions of the sale. What evidence of a delivery is sufficient to take a case out of the statute of frauds, considered.

It is a general rule, in the case of a sale of personal property, that if the property remain in the possession of the vendor, and anything remain to be done, such as weighing, measuring and the like, the title to the goods does not pass.

But it is otherwise if it was the intention of the parties that it should pass. Where, in such case, there is any question as to the intention, it should be left to the jury.

**APPEAL** by plaintiff from a judgment dismissing the complaint. This was an action to recover the value of a lot of candles, alleged to belong to the plaintiff and to be unjustly detained from him by the defendant. The cause was tried before Judge Brady and a jury, and the complaint dismissed. The facts are fully stated in the opinion of Judge Daly.

*Rufus J. Bell*, for the appellant.

*William Boies*, for the respondents.

**DALY, J.**—This is an action to recover the value of twenty-three boxes of candles, alleged to be wrongfully detained from the plaintiff by the defendants, in which the plaintiff was nonsuited upon the following state of facts:

The clerk of the plaintiff called upon one Russell to solicit an order for soap and candles. Russell agreed to take twenty-five boxes of soap and fifty boxes of candles, upon condition that the plaintiff would take in exchange all the damaged candles which Russell then had in his store. The clerk consulted the plaintiff, and he accepted the proposition; and, a day or two after, the clerk called upon Russell, and informed him that the plaintiff agreed to the terms proposed; whereupon Russell ordered, at the market price, twenty-five boxes of soap and fifty boxes of candles; and the clerk, on the part of the plaintiff, agreed to

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take, in part pay, all the stock of damaged candles that Russell had, at the rate of  $13\frac{1}{4}$  cents per pound. After the contract was made, Russell and the plaintiff's clerk went and examined an open box of candles placed near the door of the office, after which Russell took the clerk to the back part of the store, where a lot of candles were piled up together, and, showing them to him, said, "Here is the lot of candles; send down some soap, and take the candles away." Before this, Russell had told the clerk that there were from fifteen to twenty-five boxes. Candles are sold by the marks of the number of pounds on the outside of the boxes. The terms of the sale to Russell were cash for the difference upon the exchange. He was to pay  $14\frac{1}{4}$  cents per pound for the candles; the soap was to be at the market price.

The following day the clerk entered the order given by Russell on the plaintiff's order book, and a day or two afterwards fifteen boxes of soap were sent to Russell. In a few days a load of candles was sent; but Russell in the meanwhile having made an assignment, his assignee, Mr. Dimmick, refused to receive them, and they were brought back by the carman. The plaintiff's clerk then called at Russell's store, and after being informed by Dimmick of the fact of the assignment, the clerk demanded the damaged candles purchased of Russell, or that the soap which the plaintiff had delivered to Russell should be returned. Dimmick said he would take legal advice, and the clerk having called the next day, Dimmick told him that he had sold the soap and had also sold the candles, to go into the country. The clerk afterwards saw Mr. Potter, one of the defendants, who told him that he had bought a lot of candles from Dimmick, at a bargain. The clerk then stated to him the circumstances, and Potter said it was hard for the plaintiff; that he had not paid Dimmick for the candles, and also that it made no difference to the defendants how the suit terminated. The complaint alleged that twenty-three boxes of candles, slightly damaged, were delivered by Dimmick to the defendants, containing 1,177 pounds, amounting, at  $13\frac{1}{4}$  cents per pound, to \$158.89; which was not denied by the answer.

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The first question is, whether the contract for the sale or exchange of these twenty-three boxes of candles for the goods agreed to be, and in part delivered by the plaintiff, was void by the statute of frauds. It is alleged to be void because there was no delivery, in part performance, at the time the contract was entered into, the soap having been delivered a day or two after Russell and the clerk had agreed upon the terms of the sale or exchange; and we are referred to the case of *Seymour v. Davis* (2 Sandf. S. C. 239), but the decision in that case, that a delivery and acceptance in part performance of an agreement for the sale of goods must be made *at the time of the sale*, was founded upon an obvious misapprehension of the terms of the statute. The provision in the statute, respecting time, refers to the payment of part of the purchase money, and not to the receipt and acceptance of part of the goods. Where a payment of part of the purchase money is relied upon to take the case out of the statute, the payment must be made at the time when the contract is entered into; but it has been settled, in *McKnight v. Dunlop* (1 Seld. 537), by the Court of Appeals, if it was ever doubtful, that a delivery and acceptance of part of the goods takes the case out of the statute and renders the contract binding, though it takes place after the parties have agreed upon the conditions of the sale. "The oral contract," says Paige, J., in *McKnight v. Dunlop*, "may be considered good as a proposition, and the subsequent delivery of the whole or of a part of the goods, as an acceptance of the proposition and the final conclusion of a valid contract;" and it was accordingly held, in that case, that the delivery and acceptance of part of the goods, several months after the making of the verbal agreement, was a sufficient compliance with the statute; and even before that decision, it was held by the Supreme Court, in *Sprague v. Blake* (20 Wendell, 63), that a part delivery need not, by the terms of the statute, be made when the agreement is entered into. "An oral agreement," says the court, in *Sprague v. Blake*, "may stand for a mutually agreed proposition, and, unless revoked, the subsequent acceptance of part of the goods, which were the subject of the oral negotiation,

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will make it binding." In this case there was a delivery and acceptance of a part of the soap, a day or two after Russell and the plaintiff's clerk had agreed upon the terms of exchange and sale, which rendered the contract binding.

But I think the court below erred in granting a nonsuit. Before a nonsuit can be directed, there must be no doubt in respect to what is proved by the evidence. The evidence must not only be taken to be true, but it must be so clear and conclusive, in respect to the facts upon which the conclusions of law are based, that it is in the power of the court to draw every inference which a jury might draw. *Smyth v. Craig*, 3 Watts & Serg. 18. If it is not of that character, the case must be submitted to the jury under proper instructions from the court in respect to the law. This is especially so where no written agreement or contract is entered into, and a question arises as to the intent of the parties, to be gathered from their acts and declarations. Where the intent follows as the legal and logical conclusion from their acts, it may be passed upon by the court; but where, upon the evidence, it is so uncertain or doubtful as to justify a jury in finding either way, then it is not in the province of the court to pass upon the question, but the case must be submitted to the jury.

Such, I think, was the case here. The agreement was in part for the exchange of commodities, or, rather, it was an agreement for the sale of goods, payment for which was to be made partly in goods; the whole amount, or quantity of which, was not ascertained, but which was to be taken at a certain rate per pound, and partly in cash. If the parties had put their agreement in writing, and nothing more was expressed, but that the plaintiff was to deliver a certain quantity of soap and candles at a stipulated price, to be paid for partly in damaged candles and partly in cash, the construction of it, as an executory contract, would be, that the delivery of the damaged candles and the cash payment was to be contemporaneous with the delivery of the soap and candles the plaintiff had agreed to sell. But it may have been the intention of the parties here, that the damaged candles were to be delivered at once. They were pointed out, piled up

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together in the back part of the store, to the plaintiff's clerk, by Russell, who said, "Here is the lot of candles, send down some soap, and take the candles away." If this was not consenting that they might be taken away at once, and, as such, equivalent to a delivery at common law, it was certainly consenting that the plaintiff might take them away if he sent down some soap, and as he did thereafter deliver a part of the soap that had been ordered, thereby rendering the agreement valid and binding, he acquired, in pursuance of Russell's consent, the right to take the lot of damaged candles away.

It is urged, however, that there could be no delivery of the damaged candles, as the entire quantity had not been ascertained; that though separated and distinguished as a lot, the number of pounds contained in each box had not been ascertained, and that until that was done, and the whole number of pounds known, the delivery was not complete. It is, undoubtedly, the general rule in the sale of goods, that, while anything remains to be done respecting the goods between buyer and seller, the title remains in the vendor. That where any operation of weight, measurement, counting or the like, remains to be performed in order to ascertain the price, the quantity, or the particular commodity to be delivered, and to put it into a deliverable state, the contract is incomplete until such operation is performed. *Brown on Sales*, 44; *Macomber v. Parker*, 13 *Pick.* 183. This rule is founded upon the presumption of law, that it is not the intention of either buyer or seller that the title to the property should pass while something remains to be done; that they do not intend to treat it as delivered, until the vendor has done all that it is essential he should do, and nothing remains but for the vendee to take possession. But this presumption must give way, and the rule founded upon it, where it appears from the acts and declarations of parties that they intended otherwise. *Story on Contracts*, 800, *b*, and cases there collected. The authorities, moreover, are by no means agreed as to the precise extent or application to be given to this rule. Thus, it was held in *Williams v. Allen* (10 *Humph.* 339), that though the subject

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matter of the contract be clearly ascertained, yet, if the price cannot be calculated until the parties have weighed the goods, no property therein passes to the buyer until such act be done, which is in effect the present case, for the number of boxes of damaged candles, or the number of pounds in each box had not been ascertained, and until that was known, and the value computed at the rate agreed upon per pound, the amount was not ascertained that Russell was to pay in cash. So in *Dixon v. Myers* (7 Grattan, 243), it was held that if the amount of the purchase money remains yet to be ascertained by the enumeration, measurement or weighing of the article, the general rule is, that the property does not pass to the buyer, but still remains at the risk of the seller. But Mr. Justice Strong lays down the rule very differently in *Croft v. Bennett*, 2 Comst. 280. He says: "If the goods sold are clearly identified, then, although it may be necessary to number, weigh or measure them, in order to ascertain the price of the whole, at a rate agreed upon between the parties, the title will pass. If a flock of sheep is sold at so much per head, and it is agreed that they shall be counted after the sale, in order to determine the entire price of the whole, the sale is valid and complete. But if a given number out of the whole are sold, no title is acquired by the purchaser until they are separated, and their identity thus ascertained and determined. The distinction," he says, "in all these cases, does not depend so much upon what is to be done, as upon the object which is to be effected by it. If that is specification, the property is not changed; if it is merely to ascertain the total value at designated rates, the change of title is effected." The point was not directly involved in the decision of *Croft v. Bennett*, and the rule there laid down by Mr. Justice Strong can scarcely be regarded as in consonance with a subsequent decision of the Court of Appeals in *Joyce v. Adams*, 4 Seld. 291.

But whether the rule as stated by Justice Strong be correct or not, the title to the property will pass, though it be left in the possession of the vendor, and though something may remain to be done, as weighing or measuring, if such was the

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understanding of the parties. *McCandlish v. Newman*, 22 Penn. 465. *Barret v. Goddard*, 3 Mason, 107; *Macomber v. Parker*, 18 Pick. 182; *Chaplin v. Rogers*, 1 East. 192. Story on Contracts, 800, b, for the general rule above referred to, is applied only as an interpretation of the intention of the parties, in the absence of evidence of any understanding between them indicating a different intention. *Stone v. Peacock*, 35 Maine, 385. If it appear, therefore, that they intended that the property should be regarded as delivered, and that the title to it should pass, the law gives effect to their intention, and the title passes; and if what they intended is doubtful or uncertain, under all the circumstances, even though there be no contradiction in the testimony, the question of intent must be submitted to the jury, and they ~~must~~ determine it as a question of fact. *Lester v. McDowell*, 18 Penn. 95; *Clemens v. Barr*, 7 Barr, 263; *Blenkinsop v. Clayton*, 7 Taunt 597; *Phillips v. Bristol*, 2 B. & C. 511; *Baines v. Jevons*, 7 Car. & Pay. 288; Story on Contracts, *supra*. The rule is thus stated in *Hondlette v. Tallman*, (14 Maine [2 Shepley], 400): "When the law can pronounce, upon a state of facts, that there is or is not a delivery and acceptance, it is a question of law to be decided by the court; but where there may be uncertainty or difficulty in determining the true intent of the parties respecting delivery and acceptance from the facts proved, the question is to be decided by the jury." So it is said in *Riddle v. Varnum* (20 Pick. 280): "If something remains to be done, and there is no evidence tending to show that it was the intention of the parties to make an absolute and complete sale, the property does not pass to the vendee; but where the property is in a state ready for delivery, and the payment of money or the giving of security is not a condition precedent, it may well be the understanding of the parties that a sale is perfected, and that the interest passes to the vendee although the weight or measure of the article sold remains yet to be ascertained. Such a case presents a question of the intention of the parties. The party affirming the sale must satisfy the jury that it was intended to be an absolute transfer, and that all that remained to be done was merely for the pur-

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pose of ascertaining the price of the article sold, at the rate agreed upon."

In this case, the subject matter of the contract (the damaged candles) was identified and pointed out as a distinct and separate lot; and though the number of pounds had not been ascertained, and though that was essential for the purpose of ascertaining what amount was to be paid by Russell in cash, still it may have been the intention of the parties that they should be regarded as delivered to the plaintiff when he should deliver some soap in part performance of his part of the contract; that he should then be at liberty to take them away, allowing Russell for the number of pounds, at the rate agreed upon. The quantity contained was a mere matter of computation, as candles are sold by the number of pounds marked upon the outside of the boxes. If the plaintiff had, in conformity with Russell's request, taken them away without ascertaining the quantity, there could be no doubt but that the property would have been in him, as the price was agreed upon, and the ascertaining of the quantity was merely a matter of calculation. *Scott v. Wills*, 6 W. & S. 366. It may well, therefore, have been the understanding of the parties, after the terms and conditions of the contract were finally settled, that he was at liberty to take them away whenever he thought proper. Unless the court could say that it was deducible, as a conclusion of fact, from the evidence, that the parties did not intend that the candles should be taken away, or that the title to them should not vest in the plaintiff, until the quantity was ascertained, it could not take the case from the jury. If it was not in evidence that Russell directed the plaintiff's clerk to take them away, the court perhaps would be justified in coming to that conclusion; but, with that evidence in the case, the question of intent became at least too uncertain and doubtful to entitle the court to draw a positive conclusion respecting it. It was said, in *Bradbury v. Marbury* (12 Ala. 520), that "Where testimony is too indefinite and inconclusive to warrant the court in saying that one thing or another is proved by it, the question must be left to the jury;" and that, in my judgment, is the case

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here. If this case had been submitted to the jury, and they had found for the plaintiff upon this evidence, I do not see how we could have disturbed their verdict. If they drew the conclusion that Russell intended, by what he said, that the plaintiff was at liberty to take the damaged candles away whenever he sent down some soap, giving Russell credit, at the rate agreed upon, for the number of pounds he, the plaintiff, should find marked upon the boxes, could we say that there was no foundation in the evidence for such a conclusion? A jury might infer, from the explicit terms in which Russell directed the clerk to take the candles away, that he had entire confidence in the accuracy, honesty and integrity of the plaintiff, and was therefore willing to trust him and take his report of the quantity, and could we say that it would be erroneous in the jury to come to such a conclusion? But, without pursuing the illustration, it was at least doubtful, upon the evidence, what the parties intended. There was some evidence from which it might be inferred that Russell regarded the lot of damaged candles as transferred to the plaintiff, when he was advised that the terms and conditions upon which he had agreed to purchase from the plaintiff had been accepted; and the proper course, therefore, was to let the jury pass upon the question.

If the title to the property was in the plaintiff, it could not be divested by the sale to the defendants. *Williams v. Marsh*, 11 Wend. 80; *Covil v. Hill*, 4 Denio, 323. Russell's assignee could transfer no title; and if the candles purchased by the defendants were the damaged candles embraced in Russell's contract with the plaintiff, which was a question of fact to be submitted to a jury, the plaintiff could maintain the action.

**INGRAHAM, FIRST JUDGE.**—I cannot concur in the proposition that, upon proof of a contract, whether in writing or by parol, where the terms of such contract are not varied by the testimony, it becomes necessary to submit such contract to the jury for interpretation as to the intentions of the parties. If there is no dispute about the terms of a contract, it is the duty of

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the court to pass upon its validity and effect. Whether, under such proof, the plaintiff has or has not made out a cause of action, is for the court to decide; and if the uncontradicted evidence of the terms of the contract is not sufficient to show the plaintiff's right to recover, the case cannot be strengthened by submitting the evidence to a jury to ascertain the intentions of the parties making it. Where the evidence leaves the terms of the contract or any other fact in doubt, then the facts must be found by the jury; but I do not understand this rule to extend to a case where the construction of a contract is difficult, if there is no conflict in the evidence.

I do not, however, think this question to be material in this case, because, in my opinion, no title to the property ever passed to the plaintiff. The contract was for the sale, by plaintiff to Russell, of a lot of soap and candles, to be paid for in part by candles in Russell's possession. Payment, I conclude, is never to be made until delivery of the article purchased, unless by express agreement. There was no such express agreement in this case; on the contrary, the contract was, to sell the soap and candles, and to take pay part in candles at a fixed price and part in cash. The plaintiff had no more right to the candles than to the cash in advance, and, until delivery of the whole property sold by the plaintiff, he had no right to demand payment, whether in cash or candles. The purchaser had a right to elect whether, on delivery of part, he would pay in part or not; and if he so elected to pay in part, he had an equal right to elect whether such payment should not be in cash. But a delivery by the plaintiff of a part of the goods sold did not vest in him the title to the goods he was to receive in part payment; and especially so, when it is apparent that the goods delivered by the plaintiff were far less in value than the goods to which he claims title in consequence of such delivery. It could not be urged, with any reason, that a delivery of one box of soap, under that contract, would vest in the plaintiff the title to all the twenty-five boxes of candles, and yet there is no more reason for such change of title in the one case than in the other. It might be said that the remark made

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by Russell, to send down some soap and take the candles away, was an agreement to deliver them in advance. That remark was after the contract was concluded, and formed no part of it. If it had been carried out by actual delivery, the title would have passed; but it was no part of the contract, and produced no change of title until such delivery was complete.

The subsequent offer to deliver to Dimmick was no tender to Russell, and no act was afterwards done to complete the sale, or to entitle the plaintiff to a delivery of the candles by Russell; and, before that offer was made, even if it had been sufficient, the title to the damaged candles had been transferred by Russell to his assignee and by the assignee to the defendants.

I do not see how, from the evidence in the cause, the jury could find any amount as respects the quantity of candles which were so claimed by the plaintiff. The complaint fixes the quantity at twenty three boxes, but every allegation therein is denied by the answer, and there is not a particle of evidence to show that the quantity in Russell's possession was twenty-three boxes, or that they contained 1,177 lbs. It may be, however, that on the trial such value was conceded.

The dismissal of the complaint was proper, and the judgment should be affirmed.

BRADY, J., concurred in the opinion of Judge Ingraham.  
Judgment affirmed.

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**JOSEPH R. TAYLOR, President of the Central Bank of the City of New York, v. JAMES STRINGER and others.**

In an action on a promissory note against an endorser, the plaintiff, to prove service of notice of protest, called the clerk of the notary, who produced a copy of the protest, at the foot of which was a memorandum in these words: "Served notices of protest at endorsers' offices;" and testified, in substance, that he had no recollection or knowledge respecting the service of notices of protest, except what was

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indicated by the memorandum; that he was certain the memorandum was made on the day of the protest, though he had no positive recollection when it was made; that he was confident, from his invariable custom as to serving notices that the notice was served on the day following the protest, though he did not remember the fact independently of his memorandum, &c., &c. The defendants gave evidence strongly tending to disprove the receipt of notice by them.

*Held*, that, upon the whole case, there was not sufficient proof of service of notice of protest within the time required by law to charge the endorsers. (INGRAHAM, F. J., *dissented*.)

The evidence, that the clerk had no recollection of the service, independent of the memorandum, and that the memorandum was in his handwriting, and made in the usual course of business, and within the time stated by him, was sufficient to entitle the plaintiff to read the memorandum in proof of any fact which it would serve to establish; but, giving it the fullest effect, it failed to show when the notices were served.

The testimony of the clerk as to the time of service was nothing more than the conclusion drawn by him from the memorandum, his custom in serving notices, &c., and was not proof that the service was made within the time required by law.

The recollection of a fact by a witness is one thing, and his being convinced of a fact of which he has no recollection, another; and the former is the only testimony which it is competent for a witness to give—the other is not testimony.

APPEAL by defendants from a judgment upon a verdict. The action was brought upon a promissory note for \$600, made by the defendants, William A. Allen and James M. Gray, as co-partners, to the order of the defendant Henry Erben, and endorsed by him and the defendants James Stringer and William A. Townsend.

The answer of defendants Stringer and Townsend denied presentment, and notice to them, of protest; also denied plaintiff's title to the note. On the trial the plaintiffs had a verdict. The defendants Stringer and Townsend took this appeal from the judgment rendered in favor of the plaintiff.

The only question considered upon the appeal was, whether the plaintiff had sufficiently proved service of notice of protest upon the defendants Stringer and Townsend. The nature of the evidence on which he relied is sufficiently stated in the opinion of the court.

*John Graham*, for the appellants, cited *Hunt v. Maybee*, 3 Seld.

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266; *Lawrence v. Barker*, 5 Wend. 301; *Huff v. Bennett*, 2 Seld. 337; *Pierson v. Boyd*, 2 Duer, 33; *Halliday v. Martinet*, 20 Johns. 168; *Hart v. Wilson*, 2 Wend. 513; *Nichols v. Goldsmith*, 7 ibid. 160; *Seneca County Bank v. Neass*, 3 Com. 442; *Ireland v. Kip*, 11 Johns. 231; *Stewart v. Simpson*, 1 Wend. 376; *Bogart v. Morse*, 1 Com. 377; *Labar v. Hopkins*, 4 ibid. 547; 1 Grah. and W. on New Tr. 278; 2 ibid. 687; 3 Ohio R. N. S. 406; *Culter v. Carpenter*, 1 Cow. 81.

*James M. Smith*, for the respondent, cited *Lawrence v. Barker*, 5 Wend. 301; *Merrill v. Ithaca and Owego Railroad Co.*, 16 ibid. 586; 1 Greenl. Ev., §§ 437-440.

**DALY, J.**—The question in this case is, whether there was sufficient evidence of the service of notice of protest. The clerk of the notary was called by the plaintiff, and produced a copy of the protest, at the foot of which was a memorandum in these words: “served notices of protest at endorsers’ offices;” which memorandum he testified was in his handwriting. He further testified that he served notices at the endorsers’ offices, as he saw by his memorandum; that he had no positive recollection as to when the memorandum was made; that the certificate of protest was made on the evening of the 13th or the morning of the 14th, but how long after the memorandum was made he could not state, further than that he was certain that it was made the day the certificate of protest was made, or the next. That he could not swear positively that the notices of protest were served on the 14th, but could swear that it was the next day, though there was a possibility of its not being so, but that he would swear to to it; that he was confident of it from his invariable custom; that he did not remember the fact independent of his memorandum; that there was a possibility of its not being so, but he should say that the notices of protest were served on the 14th; that he served them himself, but could only say so from the memorandum; that he served all three of the endorsers, filled out the notices; did not know where he served one of them, Mr.

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Erben, unless it was at his place of business, or where he served the others, except at their place of business.

The amount of this testimony is, that, as to the fact of the service of notices of protest, the witness had no recollection or knowledge respecting it except what was indicated by the memorandum. He did swear that he was certain that the memorandum was made the day of the protest, or the next, but admitted, before doing so, that he had no positive recollection when it was made; and admitting the memorandum to have all the force and effect of an original entry, made in the course of business at the time when the witness concluded it was made, still, it is not sufficiently definite to supply what could not be obtained from the defective memory of the witness. It does not state when the service was made, nor with sufficient certainty where it was made. When the case was submitted to the jury, the defendants had furnished about as satisfactory proof as could well be furnished on their part, that no notice had been left at their place of business. They proved by their bookkeeper that any such notice or paper would necessarily go through his hands, because in keeping an account of the note in suit, as of all others, the notice of protest would have come to him, as of any other proceeding connected with this business, and that he had no knowledge that a notice of protest had been served or received at the defendants' place of business. After this proof was in, and before the case was submitted, the defendants asked for a nonsuit upon the whole evidence, and I think, as the evidence stood, that they were entitled to it.

To charge them as endorsers, it was necessary to show that notice of protest had been served on them within the time required by law. The fact that the clerk had no recollection of the service independent of the memorandum, that the memorandum was in his handwriting, that it was an entry in the usual course of the notary's business, and the clerk's conviction that it was made within the time stated by him, was, I think, sufficient to entitle the plaintiff to read the memorandum in proof of any fact that it would serve to establish. *Rex v. St. Martin Leceister,*

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2 A. & E. 210; *Cleverly v. McCullough*, 2 Hill, 445; *Clark v. Voice*, 15 Wend. 193; *Merrill v. Ithaca and Owego Railroad Co.*, 16 ibid. 586; *Halliday v. Martinet*, 20 Johns. 172. And giving it the fullest effect, all that could be proved by it was, that notices were served upon the endorsers at their offices. It does not state when they were served, and in this respect is just as defective as the memory of the witness. The testimony of the clerk, in respect to the time of service, is nothing more than the conclusion he draws from the existence of the memorandum, the time of protest, and his custom in serving such notices. It was no proof of the fact that the service was made within the time required by law, but simply a conclusion formed in his mind from the existence of other facts. If he had any recollection of the circumstance of having served the notices, however faint, may have been the impression remaining upon his memory, it would be evidence of the fact to submit to a jury. But he had none. His memory totally failed him. When he saw the memorandum he was convinced that he had made the service, and was willing to swear positively that he had made it on the 14th, but not because the memorandum recalled or revived the recollection of a circumstance which had passed from his memory, but from a conviction in his mind, the result of an operation of reason and judgment. The recollection of a fact by a witness is one thing, and his presuming or being convinced of the existence of a fact, in respect to which he has no recollection, is another. The former is the only testimony which it is competent for a witness to give, the other, upon a fact which is disputed, is no testimony at all. It is the office of the law, or the province of a jury, when the point in dispute is to be exclusively passed upon by them, to draw conclusions from facts, or presume the existence of certain facts from the existence of other facts. In this case neither the court nor the jury would be warranted, upon the facts proved, in drawing the conclusion that notice of protest had been served upon the defendant on the 14th, within which day it was necessary that it should be served to charge the defendants. All that they had before them was the state-

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ment of the witness that he was confident of it from his invariable custom:—or the evidence, or what was proved, may be thus stated:—a memorandum, under a copy of the protest, in the handwriting of the notary's clerk, stating that notice had been served upon the defendants at their office, the absence of all recollection upon the subject by the clerk, or of any knowledge respecting this particular act, except that the memorandum was in his handwriting, and his statement that it was his habit, or, as he expressed it, his invariable custom, to serve such notices within the regular time. This would not be enough to authorize the jury to presume, as matter of fact, that notice of the dishonor of this note had been served on the defendants on the day after it was protested. The facts relied upon to prove it were not disputed, so that the legal and logical inference to be drawn from these facts was matter of law, and all that they can be regarded as proving is, that notices were served at the defendants' offices. The time of such service could be inferred only in the form of a presumption drawn from the clerk's statement, that it was his habit to serve such notices within the proper time; and such a presumption could not be allowed to prevail where it is positively sworn to, in the defendants' answer, that no notice of presentment, demand, nor payment of any description was given to them, and where they have negatived such a presumption by as much proof as they could reasonably be expected in such a case to furnish. Presumptions are to be formed where facts are in dispute, when it is fully in the power of the other party, if the fact is otherwise, to show it. But in this case the defendants could not show positively that notice had not been served—for a notice of protest may be served sufficiently to charge a party without its coming to his knowledge, or the knowledge of any one at his place of business, or residence. All that the defendants could do, therefore, as they could not themselves be examined as witnesses, unless the plaintiff thought proper to call them, was to give the best negative evidence which the nature of the case would admit. This they did; and giving the same weight to their evidence which is to be given to

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the usual habit or custom of the notary's clerk, the negative presumption which it creates is quite as strong as a presumption of service, in this particular case, to be drawn from the usual course and habit of the notary's clerk.

BRADY, J., concurred in the opinion of Judge Daly.

INGRAHAM, FIRST JUDGE (dissenting).—I am still of the opinion I entertained on the trial, that the proof of the service of notice was sufficient to sustain the finding of the jury. The witness had no recollection, and it would be unreasonable to suppose that any witness could recollect the particular service of notices of protest served months or years before. He testified to the fact from the entry made by him, and from his invariably custom to serve such notices either on the day of the demand or the next day.

If the notary is required to have a distinct recollection of every notice served by him in protesting notes, he must be more than human to be able to possess it; and, where the recollection fails, the holder of a note should not be deprived of his remedy, if there is in existence a written memorandum made by the witness, of the correctness of which there is no reasonable doubt.

I think the judgment should be affirmed.

Judgment reversed.

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**HENRY D. ORGUEURRE, assignee of Mora & Navarro, v. CHARLES LULING.**

Under a written contract of sale, which is silent as to time of delivery, it is competent to prove a subsequent oral agreement, distinct from the original contract, fixing the time of delivery.

Such proof does not conflict with the rule which excludes parol evidence, enlarging or varying a written contract.

Where the purchaser of goods, under a written agreement, promised that, if the seller would defer delivery, he (the purchaser) would be responsible for any expense

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or damage which the seller might sustain by reason of the delay; held, that this was a valid agreement, under which the seller might recover expenses of storage, &c., incurred during the delay.

A purchaser of goods, who effects insurance upon them intermediate the sale and the delivery, has no claim upon the seller to be reimbursed for the premium paid, although the goods may have been, in law, at the risk of the seller during the period covered by the insurance.

**APPEAL** by defendant from a judgment of the Third District Court. This action was brought to recover \$26.40, half a month's storage of certain sugars sold by plaintiff's assignors to defendant. The defendant pleaded a general denial, and also set up a counter-claim for \$32, paid by him for insurance upon the sugars in question.

It appeared, on the trial, that the sugars were sold by the plaintiff's assignors to the defendant by a written bill of sale. This writing was dated December 1, 1855, and was for "660 boxes of sugar, at 6 $\frac{1}{4}$  cents per pound, cash, in bond." Nothing was said in the agreement as to time of delivery, nor anything as to storage or insurance meantime.

On December 3d, 1855, Navarro, one of plaintiff's assignors, called on the defendant and notified him to send for the sugars. Defendant said, that to receive them then would involve him in great expense, as the vessel that was to take them was not ready. Navarro replied that he and his partner could not wait, as the sugars were an expense to them, besides loss of weight. Defendant replied that he would be responsible for any expense or damage, even loss of weight, if Mora & Navarro would keep them till the 6th or 7th, and said he would pay some money on account of the sale, if desired. Navarro said he wished to know positively on what day defendant would receive the goods. Defendant named the 10th inst.

On December 6th, Navarro called again on defendant, who stated that he could not receive the goods till the 12th. Navarro then asked for \$8,000 or \$10,000 on account, and defendant paid him \$8,000. The goods were not taken by defendant for several days afterwards.

At the time when the goods were sold, they were in public

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store. On December 11th, a half month's storage was completed. Store-keepers (it appeared) are entitled to charge a half month's storage, no matter how short a time the goods may be kept in store. As the sugars in question were not taken from store until after the 11th, another half month's storage became due, which Mora & Navarro were compelled to pay. It was to recover this amount that the present action was brought.

The defendant had insured the goods immediately after making the payment of \$8,000, above mentioned, paying \$32 premium. He claimed to recover this as a counter-claim.

The justice disallowed the counter-claim, and rendered judgment for the amount of the storage; and defendant appealed.

*T. H. Lane*, for the appellant.

I. The case shows a written contract for the sale and delivery of sugar. Evidence to add to the terms of this contract is inadmissible, and should have been rejected. 1. Extrinsic evidence cannot be received to contradict, vary or add to an instrument in writing. *Payne v. Ladue*, 1 Hill, 116; *Erwin v. Saunders*, 1 Cowen, 249; *Goodyear v. Ogden*, 4 Hill, 104; *The Schooner Reeside*, 2 Sumner, 567; *Vail v. Adams*, 1 Seld. 155. 2. When no specific time is provided by the contract for the delivery of goods, the law fixes it, and the purchaser has a reasonable time, under the circumstances of the case, to take them away. *Chitty on Contracts*, 107; *Atwood v. Cobb*, 16 Pick. 281; *Crocker v. The Franklin Hemp and Flax Co.*, 8 Sumner, 530. 3. In this case the goods could not have been taken until they were in a deliverable state. They were not deliverable until they had been weighed, which was not done until December 16th. Even after that, defendant was entitled to a reasonable time for removing them.

II. It was admitted that no insurance could be made upon these goods for a less period than half a month, and that \$32 was a reasonable premium. The appellant was entitled to recover this as a counter-claim. The goods continued at the risk of Mora & Navarro until delivery, and, had they been destroyed

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before delivery, the \$8,000 advanced by defendant would have been recoverable back. *Joyce v. Adams*, 4 Seld. 291.

*W. C. Russel*, for respondent.

DALY, J.—When the contract of sale was entered into, on the 1st of December, Mora & Navarro had the right and were bound to deliver the sugars immediately ; that is, they were bound to deliver them within a reasonable time. On the 3d of December, they advised Luling that they were ready to deliver, and requested him to send his man for them, but Luling informed them that to receive the sugars then would involve him in great expense, as the vessel was not then ready to receive them ; and, upon being told that Mora & Navarro could not wait, as the sugars were then an expense to them, besides loss of weight, he replied that he would be responsible for any expense or damage, even that of loss of weight, if Mora & Navarro would keep them until the 6th or 7th of December. Mora & Navarro then desired to know positively what day he would receive them, if he could not receive them on the 6th or 7th ; and he answered that he would positively receive them on the 10th. On the 6th, Navarro called on Luling, and Luling told him he could not receive the sugars until the 12th ; upon which Navarro asked for \$8,000 or \$10,000 on account, and Luling paid him \$8,000.

This agreement in relation to the time of delivery was distinct, and subsequent to the contract of sale. The contract of sale was in writing—and giving in evidence proof of an oral agreement as to the time of delivery, made after the contract of sale, was not in conflict with the rule which excludes oral evidence, enlarging, altering, or varying a written contract. The written contract was executed, and the sale was not complete until the sugars were weighed and delivered, or an offer made to deliver them after everything had been done which was required on the part of the sellers. In the meanwhile, the possession and the title to the property were in the sellers, and it was at their risk. An agreement, therefore, to defer the delivery, at the request

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of and for the benefit of the buyer, was distinct and different from the executed contract of sale; and an undertaking, in consideration thereof, to be responsible for any expense or damage which the sellers might sustain by reason of the delay in the delivery, was a good and valid agreement, under which Mora & Navarro, or their assignee, might recover for any expense or damage they might thereafter be subjected to. By the agreement, Luling was to receive the sugars on the 6th or 7th, or positively on the 10th. On the 6th, he declared that he could not receive them until the 12th. In consequence of the sugars remaining in the public store after the 11th, Mora & Navarro became liable for half a month's storage (\$26.40), which they paid, and the sugars were not taken away before the 15th. Luling was to get them through the custom-house and send for them; and if, in consequence of his delay in not getting them through the custom-house, or in not sending for them in time, the sellers were put to the expense of an additional half month's storage, that was an expense for which Luling was liable under the agreement. If he was prevented in obtaining the sugars before the 12th, in consequence of the omission or neglect of Mora & Navarro to do anything that was required on their part to effect a delivery, then they would be chargeable with the expense; but the evidence does not show that the delay was attributable to them, but, on the contrary, there was sufficient evidence to warrant the justice in concluding that it was attributable to Luling.

If Luling, after he had paid the \$3,000, saw fit to insure the sugars, concluding that he had an insurable interest to that amount, or an insurable interest to the extent of their value, it was a matter entirely for his own benefit, and he had no claim against Mora & Navarro for the money thus expended. The property, before it was weighed and delivered, was at their risk, and it was at their election to insure it or not. If they did not think fit to insure it for their own protection, Luling could not insure it for them; and if he insured it for his own protection, he could not charge them with the expense. If the property, before it was weighed and ready for delivery, had been de-

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stroyed, Mora & Navarro would have been bound to return the \$8,000 to Luling. He would not be chargeable with the loss; and delivery having become impossible, the seller would have been bound to restore an advance payment upon a contract for the purchase of goods which it was not in their power to deliver. He may or may not have had an insurable interest to cover the amount he had advanced; but, if he had, Mora & Navarro cannot be compelled to bear the expense of his insuring it.

Judgment affirmed.

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**MATTHIAS BLOODGOOD v. FELIX INGOLDSBY.**

B. contracted to do certain building work for I., according to certain specifications. By the terms of the contract, the work was to be done in a good, workmanlike and substantial manner, to the satisfaction, and under the direction of S., an architect, to be testified by a certificate of S., upon the presentation of which the payments were to be made in certain installments as the work progressed. B. presented to I. certificates in these words:

"Date.

"F. I., Esq.: This is to certify that the —— payment, amounting to —— dollars, is now due to M. B., on account of his contract with you for doing the masons' and carpenters' work of your store, No. 46 Warren street."

*Held.* I. That the certificates were sufficient. It was to be presumed therefrom, that there had been a substantial compliance with the contract, and that S. was satisfied therewith.

II. That I. having made payments on similar certificates, without objection to their form, at the time of presentation, he could not raise the objection for the first time on the trial.

Where there are deficiencies in work done under a contract, although the defendant accept the work, he may claim damages for the deficiencies by way of reequipment.

**APPEAL** by plaintiff from a judgment entered on a report of a referee. This was an action to recover the last six installments claimed to be due the plaintiff for the erection of a store, No. 46 Warren street, under a building contract. By the terms of the

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contract, the plaintiff agreed to erect the store agreeably to the drawings and specifications of one Samuel A. Warner, architect, within a specified time, in a good, workmanlike and substantial manner, to the satisfaction, and under the direction of said architect, to be testified by a writing or certificate under his hand. For the work the defendant was to pay in ten installments as the work progressed, and upon presentation of the architect's certificate. The certificates of the architect were presented in this form to the defendant, from time to time, as the installments became due.

"Date, &c.

"F. Ingoldsby, Esq.: This is to certify that the —— payment, amounting to —— dollars, is now due to Matthias Bloodgood, on account of his contract with you for doing the masons' and carpenters' work of your store, No. 46 Warren street.

"Yours respectfully,

"SAMUEL A. WARNER."

Upon certificates of this form, the first four payments were made as they became due. The remaining certificates were of the same character; no objection was made upon presentation to their sufficiency, but the defendant refused to make any further payments, on the ground of alleged deficiencies and imperfections in the work. At the close of the work the following certificate was presented to the defendant.

"New York, April 2d, 1855.

"F. INGOLDSBY, Esq.

"Dear sir: Matthias Bloodgood has completed your store, No. 46 Warren street, and is now entitled to the balance due on contract. All deviations from the plans and specifications will be settled by Mr. Bloodgood, according to the provisions made for such cases in the contract.

"Yours, &c.

"SAMUEL A. WARNER."

The defendant alleged that the work was improperly and insufficiently done, and not in compliance with the contract, and

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interposed a counter-claim therefor. At the close of the trial, the defendant's counsel, for the first time during its progress, presented the objection to the plaintiff's recovery: that the certificates were insufficient, and not in compliance with the requirements of the contract. It did not appear that the defendant had ever assigned this as a reason for his refusal to pay the plaintiff the amount claimed. The referee held the certificates insufficient, and dismissed the plaintiff's complaint, without prejudice to his bringing a new action on procuring the proper certificates. He also held, that the defendant could not recover by a counter-claim, in this action, damages for deficiencies in the work. From the judgment dismissing his complaint, entered on this report, the plaintiff appealed.

*P. G. Clark*, for the appellant.

I. The defendant must be deemed to have waived the production of any different certificate than such as was produced.

The principle is well settled, that when a party is called upon to pay or perform, and he refuses generally, or for some particular reason, he cannot excuse himself when prosecuted upon grounds different than those assigned when payment is demanded. *Gould v. Banks*, Nelson, J., 8 Wendell, 557; *Boardman v. Sill*, 1 Campbell, 410, note to *Attersol v. Bryant*; *Gerrish v. Norris*, 9 Cushing Rep. 167; *Todd v. Hoggart*, 22 Eng. Com. Law Rep. p. 188.

The cases of preliminary proofs, in case of insurance policies, are strictly analogous.

The assured presents his preliminary proofs, but they do not conform to the conditions of the policy—the insurer makes no objection to them—he omits to pay—an action is brought upon the policy, he will not be permitted to raise any objection to the preliminary proofs. *O'Neil v. The Buffalo Fire Insurance Co.*, 3 Comstock, 122; *Bodle v. Chenango Co. Insurance Co.*, 2 Comstock, 53; *Elina Fire Insurance Co. v. Tyler*, 16 Wendell, 402, Walworth, Ch.; *Bumstead v. The Dividend Mutual Insurance Co.*, 2 Kernan, 81.

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The reason, or one reason, is, that if such objection had been made at the time, it could have been obviated. Another reason is, it operates as a surprise upon a party, and in no way affects the merits of the controversy.

II. The production of the certificates in the form required is no part of the performance of the contract, but simply evidence of such performance preliminary to payment. And if objection had been made to the form of the certificates, it could have been obviated.

(a) The referee held that this objection could be made under the answer containing a general denial of performance, treating the obtaining of the certificate as a part of the work to be done under the contract. In this he clearly erred. The certificates were merely evidence of performance—the point is not that no certificates were produced, but that they were insufficient in form, and this form was clearly waived. *Pepper v. Haight*, 20 *Barbour*, 429.

(b) No case can be found where the work has been done, and a certificate produced, the form of which is not objected to, but payment is refused upon other grounds, that a party has been precluded from a recovery by reason of a defect in the certificate.

*Weeks & De Forest*, for the respondent.

I. The contract specially requires, that before any installment should be payable, the certificate of the architect should be obtained, which should express that the work was done in a good and workmanlike manner, &c., and to his satisfaction; and also that it was done in accordance with the plans and specifications.

The production of these certificates was a condition precedent, without which the plaintiff cannot recover. *Buller v. Tucker*, 24 *Wend.* 447; *Milner v. Field*, 1 *Eng. Law and Equity R.* 531; *Glen v. Luth*, 22 *ibid.* 492; *Grafton v. Eastern R. R. Co.*, *ibid.* 557.

II. The certificates are insufficient, because they are not in form or substance as required by the contract.

1. They simply certify to a naked conclusion or inference,

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whereas the owner is entitled to the testimonial of the architect as to ascertained facts.

2. The contract expressly stipulates what facts shall be certified, viz.: The actual progress of the work, the quality of the materials, the workmanship, conformity to the drawings and specifications, and the architect's satisfaction.

3. The defendant was entitled to an explicit professional certificate, which should bind the architect, and have the force of an award to bind the parties.

4. The final certificate, dated 2d April, 1855, is also insufficient for the same reasons, and because it appears upon its face that the work was not finished according to the plans and specifications. *Smith v. Briggs*, 8 Denio, 74, and cases there cited.

INGRAHAM, FIRST JUDGE.—We are of opinion that the certificate of the architect was sufficient under the facts proven. That there was a substantial compliance with the contract, and that the architect was satisfied, is to be presumed from the certificate so given.

The defendant, when the certificate was presented, has not shown that he made any objection to its form, and he ought not to be allowed now, on the trial, to avail himself of an objection to the certificate, which, at the time, the plaintiff had a right to suppose was satisfactory to the defendant.

If there are any deficiencies in the work of the plaintiff, the defendant, having accepted of the building, may claim for them by way of recoupment.

The judgment is reversed, report set aside, and case opened and referred back to the referee, the evidence to stand, and either party to be allowed to produce further testimony. Costs to abide the event.

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THE MAYOR, &c., OF NEW YORK *v.* JOHN GREEN.

The notice of appeal from a judgment of a district court must itself specify the grounds of objection to the judgment. A reference to the proceedings on the trial, as the place where the grounds of appeal will be found, is not sufficient.

Errors in a complaint, although such as to be good grounds of objection if taken at the trial, do not justify a reversal of the judgment, when they are supplied by the evidence, and no harm has been occasioned by them.

On appeal, under § 366 of the Code, from a judgment of a district court, taken by default, the allegation of the defendant, that he is ignorant of law proceedings, is not a sufficient excuse for his non-attendance at the time and place mentioned in the summons served upon him.

Nor is his mere general denial of the allegations in the complaint sufficient evidence that injustice has been done him. If the defendant wishes to obtain a new trial in such a case, he must point out the mode in which injustice has been done.

APPEAL by defendant, under § 366 of the Code, from a judgment rendered in a district court by default. The action was for a violation of a city ordinance. The complaint did not specify the ordinance complained of, the blank left for that purpose in the form used not having been filled up. The defendant failed to appear, and judgment was rendered against him. The nature of his excuse for his default, &c., is sufficiently stated in the opinion of the court.

*Chauncey Shaffer*, for the appellant.

*George H. Purser*, for the respondents.

INGRAHAM, FIRST JUDGE.—The defendant did not appear in the court below, and judgment was recovered against him by default. He now appeals to this court, and asks for a reversal on two grounds: first, for errors on the trial; second, on the ground that injustice had been done, and an alleged excuse for his default.

The notice of appeal does not specify any ground of appeal, but refers to the affidavit and the proceedings on the trial as the place where such grounds of appeal may be found.

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So far as any error is alleged in the proceedings before the justice, the defect in the notice, in not stating the grounds of appeal, is conclusive upon the defendant. The 353d section of the Code is positive, that the notice must state the grounds of appeal.

In *Schwartz v. Bendel* (2 E. D. Smith, 123), this point was considered, and the court say, "The statute is explicit on this subject, and we should be warranted in dismissing the appeal on this ground."

If, however, it be said that the remedy is by motion, the grounds are not sufficient for reversal. The error pointed out in the affidavit is the omission of sums, dates, and a reference to the statute in the complaint. No objection to the pleading was taken, as the defendant did not appear; and although the filing of such a complaint and the action of the court show great negligence in rendering judgment upon it, in its imperfect condition, yet, as all the defects were supplied by the evidence, and no harm could arise to the party from such negligence, we do not feel warranted in reversing the judgment on this technical ground, even if we could overlook the defect in the notice.

The excuse offered by the defendant is hardly sufficient. He does not deny that he had a summons, or that he was thereby informed of the time at which he was to appear. On the contrary, he went to look for a counsel on that morning, and, not finding him, went to the court on the day, but after judgment had been rendered. The only excuse he gives is, that he was *ignorant of law proceedings*. This shows no excuse for not understanding what the summons told him was necessary, *viz.*, to appear on a day and at an hour and place therein stated. His own conduct shows that he knew it was proper for him to go to the court to protect his rights, but that he delayed in attending to what he should have done till after the time specified had expired.

Nor does it appear from his affidavit that injustice has been done. He states in it that "he *denies* that he has violated any of the ordinances of the plaintiffs, in manner and form as set

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forth in the complaint." This is a mere matter of opinion, whether or not he has violated them. If he wished to satisfy the court that injustice had been done, by the judgment, he should show, by a statement of facts, that the charge—made out by the evidence on the trial—was not true. On the contrary, he does no such thing. He asks this court to decide that injustice has been done him by the judgment, because he swears that he denies that he has violated the ordinances. He does not even swear that he has not violated them, but he affirms that he denies the violation—when the truth of such denial is not sworn to.

If a defendant wishes to obtain a new trial in such a case, he must point out the mode in which injustice has been done, and leave to the court, and not assume himself, the decision of that question.

In *Mix v. White* (1 E. D. Smith, 614), it was said the defendant must swear that the defence was true in fact. In *Fowler v. Colyer* (2 E. D. Smith, 125), it was held that a mere affidavit of merits disclosed no defence, and was not sufficient to warrant the granting a new trial.

Judgment affirmed.

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#### JOSHUA MEAD v. JOHN DARRAGH.

The defendant having failed to appear in a district court, on the return of a summons, the cause was adjourned to a subsequent day, and the plaintiff left the court-room. The defendant subsequently appeared, and the justice noted his appearance and received his answer. He demanded a jury, but the justice refused it upon the ground that he had no power to issue a *venire* after the adjournment. Upon the adjourned day the defendant renewed his demand, which was again refused. *Held*,—error. (INGRAHAM, J., dissenting.)

A mere adjournment does not deprive a party of the right to demand a jury, but only an adjournment made after issue joined.

A jury cannot be demanded until issue has been joined.

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If made by the defendant during the absence of the plaintiff from the court-room, it is the defendant's duty to bring home to the plaintiff notice of such demand. A justice of a district court has the right, in the exercise of a sound discretion, to permit a defendant to appear and answer at any time before proof is taken on behalf of the plaintiff. Such an appearance carries with it all the rights incidental to a regular appearance on the return of a summons—*e. g.*, the right to demand a jury.

*Per INGRAHAM, J., dissenting.*—The justice of a district court has no right to receive an appearance and answer of a defendant after the cause has been adjourned upon his default and the plaintiff has left the court-room. Such an appearance and answer being themselves irregular, and no issue being properly joined, the defendant has no right to demand a jury.

**APPEAL** by defendant from a judgment of a district court. On the return of the summons in this case the defendant failed to appear. On the application of the plaintiff, the cause was adjourned, and the plaintiff left the court-room. Thereafter, but on the same day, and while the court was still in session, the defendant entered, and, at his request, the justice entered his appearance and received his answer. He at the same time demanded a jury, which the justice refused, upon the ground that he had no power to order a jury, the cause having been once adjourned. On the day to which the cause was adjourned, the defendant renewed the demand, and excepted to the decision of the justice, refusing to order a jury. Judgment having been rendered for the plaintiff, the defendant appealed.

**BRADY, J.**—In this case, on the day the summons was returnable, but after the cause had been adjourned, and while the court was in session, the defendant appeared before the justice, put in a general denial to the complaint, and demanded a jury. The justice received the answer, but denied the application for a jury, on the ground that it was too late, an adjournment having been granted. There was no power conferred on the justices of district courts by statute to open defaults, but in *Jenkins v. Brown* (21 Wendell, 454), Cowen, J., says, in substance, “I am strongly inclined to think that the justice might, on cause shown, let in a defendant to plead at any stage of the cause, on terms

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such as shall save all reasonable chance of preparation to the plaintiff, while it subserves the purposes of justice by promoting a trial upon the merits, without dispensing with the exercise of proper diligence on the side of the defendant." In that case the power of the justice was recognized as matter of discretion, and that discretion having been exercised adversely to the appellant, the Supreme Court refused to interfere. Assuming that the justice in this case had no power to open the default, then the demand for a jury was properly denied, the whole of the proceedings before the justice being *coram non judice*, and void. But if the justice had power to let the defendant in to plead, and no objection to that course was taken or made by the respondent, then the demand for the jury was in due time, and the refusal of the justice to issue a *venire* was an error. In *Bayles v. Crane* (1 Cowen, 86), it was held that a mere adjournment did not deprive the party of the right to insist upon a jury, although in that case the adjournment had ~~was~~ to an hour on the same day. In *Shannon v. Kennedy* (1 E. D. Smith, 346), the right of the defendant to demand a jury at any time during the day on which issue is joined is suggested and recognized, but coupled with the doctrine that it is the duty of the defendant to bring notice of such demand home to the plaintiff. In that case the demand was made of the justice on the day of issue joined, after the plaintiff had left court, but not on the day to which the cause was adjourned, and the plaintiff had no notice of the demand. In this case the demand was repeated on the day to which the cause had been adjourned, and the justice again declined to issue the *venire*. The question presented by these facts is not free from difficulty; but I think the justice has the right to permit the defendant to appear and answer before any proof is taken on the plaintiff's side, and having granted that favor, it must exist with all the rights incidental to an appearance when the summons is returnable. The justice may impose terms, but none were imposed here. He did not deny the *venire* as a condition upon letting the defendant in to answer, but upon the ground that he had no power to issue one, an adjournment having been had. In this

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he erred. When the issue is joined, a demand may be made for a jury, and not before; and the adjournment contemplated by the statute is an adjournment *after issue joined*, and subsequent to the day on which such adjournment is made, the object being, to prevent the delay which would ensue by permitting the defendant to demand a jury at any stage of the cause before proof taken. On the return day, the justice, doubtless, had no power to receive the defendant's answer, because the plaintiff was not present; but he had on the day to which the cause was adjourned, and having entered the defendant's appearance and answer, it must be held to relate to that day. The issue then being joined, the defendant demanded a jury, to which he was entitled (see *Shannon v. Kennedy*, 1 E. D. Smith, *supra*, 348), and the justice should have issued a *venire*. Having refused so to do, I think the judgment should be reversed.

**DALY, J.**—A jury may be demanded *after issue joined*, and before the court shall proceed to inquire into the merits of the case, though it cannot be demanded *after the day on which an order has been made for an adjournment*. Laws of 1813, chap. 86, § 95; Laws of 1820, chap. 1, § 8. It was demanded in this case *after issue joined*, and on the day on which the order was made for the adjournment. It was irregular, therefore, for the justice, on the adjournment day, to go on and try the cause without a jury. The justice returns that he had adjourned the cause on the plaintiff's application, but that the defendant appearing afterwards, he allowed him to plead. This makes no difference. When the defendant had joined issue by pleading, he had a right to demand a jury, which he did immediately thereafter, and the justice could not try the case without a jury, unless with the defendant's consent. The judgment should be reversed.

**INGRAHAM, FIRST JUDGE.**—I do not feel satisfied with the conclusion that the justice was regular in receiving an answer *after the adjournment of the case*. The plaintiff had left the court; he had no knowledge of the pleading; and it nowhere

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appears that the knowledge of such answer being put in ever came to the plaintiff. To sanction such a course of proceeding in a justice's court would open a door to looseness and irregularity, which should not be permitted. I think no answer was properly put in, and no issue properly joined, and that the demand for a jury was properly refused.

Judgment reversed.

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#### WILLIAM CARLISLE v. CATHARINE McCALL and others.

In summary proceedings to recover possession of demised premises, the evidence showed that defendants entered upon the premises immediately before the expiration of the term of plaintiff's tenant; but the tenant testified positively that she never gave defendants permission to come in, nor sold nor assigned her lease to them; that they came in as she was moving out, claiming that the premises were theirs.

*Held*, that, upon the evidence, the entry was under a claim of title hostile to plaintiff, and not under his demise; and that there was, therefore, no relation of landlord and tenant between the plaintiff and defendants which could support summary proceedings. (BRADY, J., *dissented*.)

A justice of the district court has jurisdiction of summary proceedings to obtain possession of demised premises within the city and county of New York, although neither of the parties reside and the premises are not situated within the district for which such justice is elected. *Per* BRADY, J.

On the trial of an issue joined in summary proceedings to recover possession of demised premises, the evidence was closed upon both sides, and the cause submitted, with the single reservation of leave to put in written points, and, after adjournment, the counsel for the landlord applied to the justice to discontinue the proceeding. No decision in the cause was ever rendered by the justice.

*Held*, that this proceeding was no bar to a subsequent one, although between the same parties and involving the same questions.

APPEAL from the judgment of the justice of the Fourth District Court, in summary proceedings to recover possession of land. The affidavit of William Carlisle, on which the proceedings before the justice were based, stated that he was owner of the premises claimed (the back basement room of the house 47

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Troy street, in New York city); that he rented them to Elizabeth Markey for one month; that, during that term, Catharine McCall, Jane McCall and Richard Carlisle entered on the premises under Markey, and she, as deponent was informed and believed, demised the same to them; that the term had expired, but the McCalls and Carlisle continued in possession without deponent's permission.

The defendants filed an affidavit, denying that they entered on the premises under Markey, and denying that the claimant was owner of the premises, or that the defendants were his tenants; and averring that Catharine and Jane McCall were owners of the premises in their own right, and were entitled to the possession, and entered as owners and not otherwise.

On the trial before the justice, the defendants added to their answer the allegation that the same question had been previously tried before the same justice, and he had given judgment thereon.

They then moved to dismiss the proceedings for want of jurisdiction, on the ground that the premises claimed were not within the justice's district, and neither of the parties resided within the district. This motion was denied.

The plaintiff proved the letting to Elizabeth Markey, by the testimony of Margaret Carlisle, and rested. The defendants then moved to dismiss the proceeding, on the ground that there was no evidence that they entered under Mrs. Markey. This motion was denied.

They then introduced evidence of former proceedings of the same nature, between the same parties, and involving the same questions. It appeared, however, that after the former case had been heard and submitted, excepting leave reserved to submit written points, the proceedings were discontinued and no decision was ever rendered.

They then called as a witness Elizabeth Markey, who testified that she never sold or assigned the lease, and never gave defendants any permission to come in. They came in as she was moving out, saying that the place was theirs.

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The defendants called William Carlisle and Richard Carlisle, but the justice excluded them as incompetent. They also offered evidence of title in the McCalls, but this was also excluded.

The justice rendered judgment for the plaintiff, that he have possession of the premises, and that a warrant issue to put him in possession. The defendants appealed from this judgment.

*C. N. Potter*, for the appellants.

I. The ruling of the justice, upon the motion to dismiss for want of jurisdiction, was clearly erroneous. The landlord's affidavit must show that the relation of landlord and tenant exists. *Benjamin v. Benjamin*, 1 Seld. 387. And his affidavit cannot be aided by intendment. *Prindle v. Anderson*, 19 Wend. 395; *Farrington v. Morgan*, 20 Wend. 209.

II. The testimony of the landlord wholly failed to show that such relationship in fact existed. No implied or constructive tenancy can be raised in aid of these proceedings. *Benjamin v. Benjamin*, 1 Seld. 388; *Roach v. Cozine*, 9 Wend. 227; *Syms v. Humphrey*, 4 Den. 186.

III. The testimony of the appellants showed that they entered either legally as heirs, or illegally by forcible entry and detainer; and the respondent's remedy was either ejectment or summary proceedings for forcible entry and detainer.

IV. The former proceedings were a bar. The statute does not allow a withdrawal of the case, but only provides for a "final decision." 2 Rev. Stat., 4th ed., 759; Laws of 1849, ch. 193, § 5. If these proceedings may be discontinued, it must be before the cause is submitted for advisement. 2 Cow. Tr. 334; *Elvell v. McQueen*, 10 Wend. 519; *Heas v. Beekman*, 11 Johns. 457. Here it appeared that the cause was only kept open to receive points. Then it was closed for all other purposes—for a motion to discontinue included.

V. The refusal of the justice to permit the examination of William and Richard Carlisle was erroneous. There can be no reason why the trial should not be governed by the ordinary

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rules of evidence. The statute conferring jurisdiction does not except these proceedings from those rules.

*H. P. Fessenden*, for the respondents.

I. It is true that the landlord's affidavit must show that the relation of landlord and tenant exists, or existed, and that it arose *out of* contract; but it is not true that the contract must be between the landlord and the present tenant directly. On the contrary, a sub-tenant, or one who comes in by arrangement of any kind, or collusion, with the original tenant, is just as much the tenant, and the tenant by contract, of the landlord, as the original tenant himself; that is, at the landlord's option. 2 R.S. 12 (marg. pag.), § 28, as amended by Laws of 1849, ch. 193, p. 291; *Birdsall v. Phillips*, 17 Wend. 472, 473. Where there is a lease, a third person, found in possession of the premises, is presumed, *prima facie*, to be assignee of the term. *Williams v. Woodward*, 2 Wend. 487, 492, 493; *Acker v. Wetherell*, 4 Hill, 112, 116; *Stewart v. Roderick*, 4 Watts & S. 188. Nor is the landlord's affidavit to be construed with any special strictness, but rather with liberality. *Lynde v. Noble*, 20 Johns. 80, 82; *Gardner v. Keteltas*, 3 Hill, 332.

II. The evidence showed facts from which the justice might well infer, as he did infer, that the defendants came in by arrangement with the first tenant, and so became tenants as much as she was. One who comes into lands under another can set up no title which the first could not. *Jackson v. Harder*, 4 Johns. 202, 210, 211, 212; *Jackson v. Davis*, 5 Cowen, 129, 130; *Rankin v. Ten Brook*, 4 Watts, 386, 388; *Graham v. Moore*, 4 Serg. & R. 467, 472.

III. The landlord, doubtless, might have brought ejectment, and so he may in every case where summary proceedings are proper. He had no remedy as for a forcible entry and detainer, for no force on the appellants' part is shown; nor was he bound to proceed as for a forcible detainer, if only the appellants could be regarded as his tenants. All summary proceedings are a substitute for ejectment. *Lynde v. Noble*, 20 Johns. 80, 82; *Birdsall v. Phillips*, 17 Wend. 472, 473.

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IV. The former proceedings were not submitted or closed, nor were they pending. They were properly discontinued. There is no prohibition on a landlord to discontinue summary proceedings at any time before a decision has been made; and it is a natural incident to every proceeding. In *Ogsbury v. La Farge* (2 Coms. 113) there was nothing more for the parties to do, and there had been a decree dismissing the complaint.

V. The Code, which alone allows the examination of adverse parties and co-defendants, has no application to these summary proceedings, but expressly excludes them from its scope. Code, § 471; 2 R. S. 511 (marg. pag.)

DALY, J.—The foundation for this proceeding was the demise from the plaintiff to Mrs. Markey, and unless the evidence will support a finding, on the part of the justice, that the defendants' possession was under that demise, the judgment was erroneous. As the defendants entered while Mrs. Markey was in possession and before the expiration of the month for which she had paid rent, the legal presumption might be that they remained in possession after she left, as her assignee. But that presumption is destroyed by her positive statement that she never gave them permission to come in, or sold or assigned her lease to them; that she did not want to stay in the premises, and that they came in as she was moving out, claiming that the place was theirs; that she did not forbid them from coming in, because she thought that she had no right to forbid their coming into their own house. The entry and possession of the defendants, therefore, was under a claim of title hostile to the plaintiff, and not under or by virtue of his demise. As Mrs. Markey was leaving, they entered, claiming that the premises were theirs. When they entered, she had the right to the possession until the expiration of the month; and, as between her and the landlord, he had the right to possession after that time, as she gave up the premises. As the defendants claimed that the premises were theirs when they entered, that claim was as hostile to the right of possession she had under the demise as it was hostile to any claim the

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plaintiff might have thereafter; nor did her acquiescing in their right to enter and take possession make it the less so, or render them her assignee. The nature of their entry admitted neither title in her nor in her landlord, but was a claim of title and a right of possession not derived from, growing out of, or flowing from the demise by the plaintiff to her. Upon this evidence, the justice could not assume that the relation of landlord and tenant subsisted between the defendants and the plaintiff; and, if it did not, there was no foundation for the proceeding. If they were intruders, holding the possession without right, the only remedy of the plaintiff was by an action of ejectment, the entry of the defendants not having been accompanied by any force to warrant the institution of proceedings for forcible entry and detainer.

The judgment should be set aside.

INGRAHAM, FIRST JUDGE.—I concur with Judge Daly, in the opinion that the evidence did not warrant the justice in finding that the defendant was holding the possession under the tenant, or that there was any privity which warranted this proceeding against the defendants to obtain possession of the premises.

The presumption of law that the defendants were the assignees of the tenant was rebutted by positive evidence.

I concede that there is great hardship in a landlord being compelled to resort to an action to obtain possession of his premises from an intruder; but if the laws give no authority to remove him in such a case, the remedy is with the legislature, and not the courts.

The decision of the justice should be reversed.

BRADY, J. (dissenting).—The first objection taken before the justice, and upon which the defendants moved to dismiss the proceedings, was, that the premises not being within the district for which the justice was elected, he had no jurisdiction. That objection was not urged on the appeal, and it may not be necessary to notice it; but it was not well taken, because the jurisdiction of the justice in these proceedings is co-extensive with

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the city and county of New York. *Roach v. Cozine*, 9 Wendell, 227.

The next objection taken, and upon which a motion was also made to dismiss the proceedings, was, that there was no evidence that the defendants entered under Mrs. Markey, the plaintiff's lessee. It is true that these proceedings cannot be entertained unless the relation of landlord and tenant exists (*Everett v. Sutton*, 5 Wend. 281; *Roach v. Cozine*, 9 ibid. 227; *Sims v. Humphrey*, 4 Denio, 185; *Benjamin v. Benjamin*, 1 Selden, 387); but when that is once established, it attaches to all who succeed to the possession during the demise, whether as under-tenant or as assignee. See opinion of Justice Sutherland, in *Jackson v. Davis*, 5 Cowen, 129, and *Jackson v. Miller*, 6 Wend. 233. There was no objection to the sufficiency of the affidavit on which the summons was issued, made before the justice, and the only one stated by the appellants, in the argument submitted by them, is, that the affidavit did not aver any privity between the *landlord* and the appellants. It was not necessary that it should. The proceedings were not founded upon the relation of landlord and tenant between the appellants and the respondent, but between Mrs. Markey and the respondent, which gave him the right, as suggested, to remove all persons who claimed under her. There can be no doubt about this, the statute providing for such a state of things in express terms. A tenant for any part of a year, and the assigns, under-tenant or legal representatives of such tenant, may be proceeded against and removed in the cases enumerated. 2 Rev. Stat., 4th ed., 756. The affidavit alleges that the appellants entered upon the premises under Mrs. Markey, and on information and belief that Mrs. Markey demised the same to them. The possession of the premises was not denied, although it was claimed to have been taken under title, and not under Mrs. Markey; but the respondent proved the letting to Mrs. Markey, and the possession of the appellants, by the witness Margaret Carlisle. This did not establish that they were the under-tenants of Mrs. Markey, but created a presumption of law that they were her assignees. Wit-

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*Williams v. Woodward*, 2 Wend. 487-492; *Acker v. Wetherell*, 4 Hill, 116. The decisions are not uniform, to the effect that the statute on which these proceedings are founded should be strictly construed. In *Lynde v. Noble* (20 Johns. 82) and in *Gardner v. Keteltas* (3 Hill, 332) it is said, by Justices Woodworth and Nelson, that it is a remedial act, and must be construed liberally to carry into effect the intent, by suppressing the mischief and advancing the remedy, where tenants hold over. Whatever may be the rule of construction adopted, it will not repudiate the application, to these proceedings, of the legal presumptions arising from facts proved. The relation of landlord and tenant must be shown, it is true, and cannot arise by operation of law, except in the case mentioned in the statute; but when that is established, then the courts will favor the practical operation of the act under consideration, at least, by the application of the rules of evidence. It is also true that the presumption suggested in an action to recover rent, or upon the lease, might be rebutted by proof that the appellants were under-tenants. 2 Phil. Ev. 159 (Cowen & Hill's Notes, ed. 1839); *Williams v. Woodward*, *supra*. But in these proceedings, to recover possession on the ground that the tenant holds over after the expiration of the term demised, it is wholly immaterial whether the parties in possession are under-tenants or assignees, provided they enter while the tenant is in possession of the premises. The proceeding is against the tenant, but the remedy extends to his under-tenant, assigns, legal representatives, and *all persons in possession of the premises*. The first subdivision of section 32 provides that the summons shall be served on the *tenant* to whom it shall be directed; and subdivision two, that if such tenant be absent from his last or usual place of residence, by leaving a copy thereof at such place, with some person of mature age residing on the premises. These provisions contemplate a proceeding against the tenant, and such may be said of section 29, providing for the oath, in writing, of the facts to give jurisdiction. Section 33 prescribes the form of the warrant, and commands the person to whom it is issued to remove *all persons* from the premises, and to put the applicant in

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possession thereof. It is not confined to the persons named in it, and very properly, founded, as it is, upon the landlord's right of possession, duly adjudged. If the persons in possession are neither under-tenants, assignees, nor legal representatives, they are not, upon a strict construction of this statute, entitled to notice of the proceedings; and if they are, their having received notice, they must abide the result of the issue between the landlord and the tenant. Going into possession under the latter is conclusive upon them in these proceedings, and that fact creates a presumption *that cannot be rebutted*. They hold in subordination to the relative rights and obligations of the landlord and tenant. If they have any right derived from the tenant, it must fail to avail them when the sources of their title are exhausted.

The tenant, though he may have an interest in the premises, cannot deny his landlord's title; and those claiming under, or who follow, or unite with him in the possession, must be subjected to the laws which govern the relation of the original parties. Suppose, for example, that "A" rented a house to "B," and "C" hired from "B" lodgings and apartments with board, and, when the term of "B" expired, refused to quit the apartments hired, although "B" gave up the rest of the premises to the landlord. "C" would not be the tenant of "B." The relation of landlord and tenant would not exist between them (*Wilson v. Martin*, 1 Denio, 602), and unless presumed to be the assignee of "B," from possession alone, could not be removed if it be held that none but under-tenants, assigns, or legal representatives can be proceeded against, and not then successfully, if he were permitted to rebut that presumption, and to prove the incident of his possession. Where, however, the tenant, upon the expiration of his term, vacates the premises, and, before the landlord resumes actual possession, a person enters, these proceedings could not be adopted against him. There would then be no relation of landlord and tenant, and no privity of contract by which he could be affected. He would be neither the under-tenant, assignee, nor legal representative of the tenant, and the landlord would be driven to his action for relief. It is true, that *any person* in pos-

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session, or claiming possession, may, at the time appointed for showing cause, or before, file an affidavit denying the facts, or any of them, alleged in the affidavit of the landlord, whether under-tenants, assigns, legal representatives or not. It is true, also, the Supreme Court, *per* Justice Bronson, in *Hill v. Stocking*, (6 Hill, 316), and *Sims v. Humphrey* (4 Denio, 185), has declared that when the proceeding is not to remove the lessee, he not being in possession, the party in possession must be named, and his relation to the *landlord* shown. I do not understand that case to conflict with the views herein expressed. The relation of the appellants to the respondent was shown, and the summons directed to them by name. The provisions of the statute are all in harmony with the construction, that it is a proceeding between landlord and tenant by demise, and not one to determine vexed titles, or questions of title, and that such relation, once established, attaches during the term to all who occupy the premises, either conjointly with the tenant or by his sufferance, or enter into the possession thereof with him during his term and possession, under claim or color of title or otherwise.

Any person in possession may, by appearing, protect himself against the allegation, either that the rent is due or the term expired. He has an interest in the possession which he may wish to maintain, and may put the landlord to the proof of the facts named. He may also deny that the applicant is the landlord as alleged, by showing that the tenant hired from some other person, or deny that the person named as the tenant is in fact the tenant, and show that the premises were let to some other person. If a rule contrary to the one here presented prevails, then any person who enters during the term, not as assignee, and not as under-tenant, although by collusion with the tenant, cannot be ejected, notwithstanding that the tenant himself has abandoned or quitted the premises in deference to the landlord's title and right. I do not believe such to be the law. Here the proof is, that the appellants entered while Mrs. Markey was in possession, and without opposition or objection from her; and it was sufficient to entitle the respondent to possession of the premises. The motion to

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dismiss, secondly made, was therefore properly denied, and for these reasons the offer to show title in the appellants was properly excluded.

By section 471 of the Code of Procedure, the provisions of that act are excepted from any application to these proceedings, and the respondent was not obliged to submit to an examination. For the same reason, and the additional one that he was proved to be in possession, Richard Carlisle was also properly excluded. Whether he was in fact in possession, the whole testimony being conflicting on that subject, was a matter of fact to be decided, and he was therefore a party to the record, and could not be examined for his co-defendant or himself.

There is nothing in the objection that a proceeding, similar to the one under consideration, was formerly had before the justice. It was discontinued, and no judgment by the justice ever announced or made. There was no decision of the cause.

Though a suit be tried on its merits before a justice, and submitted for his decision, yet if he omit to render judgment therein, the proceeding will form no bar to a second action for the same cause. *Young v. Rummell*, 5 Hill, 60. There is nothing in the statute to prevent the applicant from discontinuing the proceedings at any time before a judgment. The cases cited by the appellants show that a cause being submitted, the justice has no power to enter a judgment of nonsuit. Here there was no finding of any kind, and no judgment. The plaintiff, in an action prior to the Code of Procedure, and down to the adoption of the 47th rule of the late Supreme Court in 1845, might refuse to answer when the jury returned to the bar to render their verdict, and be nonsuited. That rule of the Supreme Court cannot be held to apply to summary proceedings to recover the possession of land. I think the judgment should be affirmed.

Judgment reversed.

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Wood v. Derrickson.

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**GEORGE T. WOOD v. JAMES T. DERRICKSON and JOHN CLAPP, JR.**

To sustain an action upon an undertaking given on appeal, it is not necessary that an execution should have been issued upon the judgment when affirmed. The undertaking is forfeited and the liability of the sureties fixed as soon as the judgment of affirmance takes place, and the debtor makes default in its payment. In such an action, an answer which sets up that the defendant in the judgment owned real estate, and the execution issued was returned by the sheriff before the expiration of sixty days, at the plaintiff's request, without attempting to make the money out of the real estate, is frivolous.

**APPEAL** by defendants from an order made at special term by Judge Brady, directing judgment on account of the frivolousness of an answer. The action was upon an undertaking given on appeal in the usual form. The nature of the defence set up in the answer is stated in the opinion of the court.

*Stephens and Hoxic, for the appellants.*

*James M. Smith, Jr., for the respondent.*

**INGRAHAM, FIRST JUDGE.**—There is no ground upon which this appeal can be sustained.

The action was upon an undertaking given on appeal, and was conditioned for the payment, of all costs and damages which might be awarded on appeal, and of the judgment of affirmance. It did not require the issuing an execution, but was forfeited as soon as the affirmance of the judgment took place, and the debtor made default in its payment.

The answer merely sets up that the defendant was the owner of real estate, and the execution issued was returned by the sheriff before the expiration of sixty days, at the plaintiff's request, without attempting to make the money out of the real estate.

This formed no defence to the action. It did not relieve the defendants from their liability previously incurred. It may be

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that the surety might have required the creditor to issue an execution and levy on the real estate; but, without such a request, he cannot complain that the creditor has not pursued his remedy further against his debtor than the issue of an execution.

The order appealed from is affirmed, with costs.

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### FREDERICK J. BETTS v. ANDREW S. GARR.

The court should not grant leave (under section 284 of the Code) to issue execution on a judgment after the lapse of five years from its rendition, where it appears that the judgment-debtor holds a judgment against the party making the application greater in amount than that on which the application is based. (BRAUN, J., dissenting.)

In such a case, the party applying for leave should be left to an action upon his judgment, in which action the debtor may avail himself of his equitable set-off.

**APPEAL** by plaintiff from an order of the special term denying a motion for leave to issue execution. The facts disclosed by the affidavit on which the motion was based were as follows:— In 1842, the plaintiff recovered judgment in this court against the defendant for \$77.58. In 1854, he assigned the judgment to John M. Martin, who now applied, in the name of the plaintiff, for leave to issue execution. On the day when the judgment was originally docketed, execution was issued, which was returned unsatisfied. No execution had been issued since that time. The affidavit also stated, that no part of the money had ever been paid to deponent (Martin), and that he was informed, and believed, none had ever been paid to the plaintiff.

In opposition to the motion, defendant showed that, prior to the assignment of the judgment in question to Martin, one Kanouse had recovered a judgment against Martin; that this judgment was exclusively for costs in an action wherein the defendant was attorney for Kanouse, and belonged to defendant as such attorney; and had, moreover, been assigned to him by Kanouse; and that no part of the judgment had been paid.

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The motion was denied at special term, and plaintiff appealed.

*John M. Martin*, for the appellant.

The respondent in person.

**DALY, J.**—This motion was denied upon the ground that the court should not allow an execution to issue, where it appeared that the defendant had a judgment against the assignee by whom the motion was made, greater in amount than the judgment in this court; but that, if Martin wanted to enforce this judgment, he should be put to his action upon it, in which action Garr might avail himself of his equitable set-off; and I still adhere to the opinion that that is the proper disposition to make of such a case. It is unnecessary that Martin should be allowed to issue execution and levy upon the property of Garr, or that Garr should issue execution upon the judgment assigned to him, and levy upon the property of Martin, when, by putting Martin to his action upon the judgment, the rights of the parties could be equitably adjusted.

**INGRAHAM, F. J.**, concurred.

**BRADY, J. (dissenting)**.—Section 284 of the Code provides that, after the lapse of five years, an execution can be issued only by leave of the court, upon motion, with personal notice to the adverse party, unless he be absent, &c.; and on its being established by the oath of the party, or other satisfactory proof, that the judgment, or some part thereof, remains unsatisfied and due. On the application for leave to issue execution, all the requisites of the statute were complied with, although it appeared that John M. Martin had become the assignee of the judgment, and that the application was for his benefit. Upon that circumstance the defendant insists that the motion could not be entertained, the remedy of an assignee being only by action under section

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428. This view of the statute cannot prevail. The assignee of a judgment, under the system prior to the Code, could, at any time during the period for that purpose, issue an execution in the name of the judgment-creditor, and there is nothing in the Code which indicates any intention of the legislature to change that rule. The right of any person owning the judgment to issue an execution during the five years prescribed by the statute cannot be doubted, and that right is affected by the Code only so far as to make it obligatory upon the party in interest to apply for leave to issue execution after the five years have expired. There is certainly nothing expressly affecting that right; and the desire exhibited by the courts to prevent multiplicity of actions will prevent a mere implication from operating against it. The application here was not for leave to issue an execution in the name of Martin, but for leave to issue it in the action in the same manner as if the judgment-creditor were in fact the applicant. There can be no change of parties, and the assignee succeeds to all the rights of the assignor. The fact that the defendant held judgments against the assignee was no reason why leave should not be granted. On a motion for such leave, all other requisites appearing, the only question the court may inquire into is, whether the judgment is paid in whole or in part. The set-offs of the judgment-debtor, or counter-claims, whether by way of judgment or otherwise, cannot be applied. The remedy of the defendant may be an application to have the judgments set off, and to that remedy the court must leave him. For these reasons the order made at special term should be reversed. The case of *Jay v. Martine* (2 Duer, 654), cited by the respondent, presents a very different question to that under consideration, and seems to have been properly decided; and the case of *Martin v. Kanouse* (2 Abb. 890), also cited by the respondent, has no application to the case in hand.

The appeal in this case is taken, not by the attorney only, but by the assignee, who is the representative of the assignor, and the party in interest owning the judgment by transfer duly executed. In the case referred to the attorney appealed, and his

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right to appeal was based upon his professional relation, and a claim existing in his favor growing out of such relation. He was not the assignee, but entitled by operation of law to the costs, which the judgment secured. Whether the principle suggested in that case be correct or not, it is not in point here, and cannot control the opinion of the court.

The assignee alleges, on information and belief, that no part of the money recovered by the judgment, or the interest due thereon, has ever been paid to the plaintiff, or any one else for him. That no payment has been made to the assignee, and that the whole of the same is now due and unpaid. This is a sufficient compliance with section 284, and establishes sufficiently, for the purpose of putting the defendant to his allegation to the contrary, that neither the judgment, nor any part thereof, has in fact been paid. If the execution were to issue, on an *ex parte* application, a different rule might prevail, and proof, not on information and belief, but positive in its character, required before leave to issue such execution was granted. This, however, is a motion by an assignee of the judgment, and upon personal notice to the judgment-debtor, who can, by averring payment, dispose of it without difficulty, and with costs to indemnify him for his expenses in resisting the motion.

For these reasons I think there was sufficient in the moving papers upon which the motion could be entertained, without reference to the fact that the defendant does not allege payment of the judgment.

Order appealed from affirmed.

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### ELIZA M. BADGER v. SETH W. BENEDICT.

Separate causes of action, arising out of breach of contract, and injuries to property the subject of the contract, entrusted to another to enable him to perform it, may properly be joined as arising out of one transaction.

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*So held* upon demurrer, in a case where E. M. B., by her complaint, claimed to recover of S. W. B. for a breach of a contract to publish a book from certain stereotype plates, delivered; for the loss of the plates by S. W. B. through his gross carelessness and negligence; for the moneys advanced to him upon the contract by E. M. B.; for the damages arising from his delay in the publication, and for the additional expense over the contract price, in subsequently publishing the book.

An omission to comply with the rule, requiring each cause of action to be numbered and separately stated, is not the subject of a demurrer. *Per* BRADY, J.

**APPEAL** from an order at special term overruling a demurrer by the defendant to the complaint in the action.

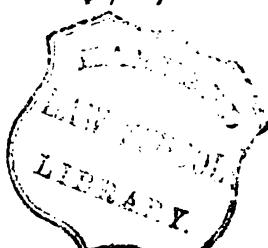
The complaint alleged that about January 1st, 1854, the plaintiff made a contract with the defendant, whereby the defendant agreed to furnish paper for, and to print and bind for ~~the~~ plaintiff, within thirty days, 2,000 copies of a book of memoirs, for the price and at the rate of \$271 for each thousand copies, payable at three months from the completion of the work.

That, in accordance with and for the purpose of fulfilling the contract, the defendant received into his possession, from the plaintiff, the stereotype plates of the memoir of the value of \$500.

That after so receiving them he neglected to fulfil the contract, and afterwards refused to fulfil it, unless the plaintiff would advance thereon about \$200.

That, accordingly, the plaintiff did, about March 1st, 1854, advance thereon to the defendant \$188, but after receiving the money defendant refused to fulfil, or to return the plates or the moneys thus advanced.

That by the defendant's gross carelessness and negligence in keeping the stereotype plates, previous to March, 1854, and by his breach of the contract, caused them to be destroyed, so that they were entirely lost to the plaintiff, and by reason of which she was put to a great additional expense in printing the 2,000 copies agreed on, viz., \$298, and was also subjected to other expense and damage by reason of the delay in the publication, in consequence of which the sale of the book was greatly injured. Such damages, in the whole, amounted to at least \$1,000, for which judgment was demanded.



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The demurrer specified, as a single ground of objection, that it appeared upon the face of the complaint that several causes of action were improperly united.

Judge Brady, at special term, overruled the demurrer, giving judgment for the plaintiff thereon. His reasons were stated as follows:

BRADY, J.—This is an action to recover damages for a violation of an agreement to furnish paper for, and to print and bind a memoir, and for damages for the destruction of the stereotype plates of the memoir delivered by the plaintiff to the defendant, for such printing, &c. The causes of action, namely, the violation of the contract, and the cause arising from the destruction of the plates, are not separately stated, the pleader regarding the whole as constituting a single cause of action. The defendant demurs, assigning as a ground of demurrer, that several causes of action have been improperly recited, and insists that if the causes of action have been properly recited, they are not separately stated, and that the complaint is demurrable for that reason.

In reference to the first objection, there is little difficulty. The Code, section 167, allows a plaintiff to unite several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they shall arise out of the same transaction or transactions connected with the same subject of action, but requires them to be separately stated. Although the tort might be waived, and the value of the chattels claimed as an indebtedness upon an implied contract to pay for them (7 Pr. R. 278), and thus bring that branch of the case within the class to which the other branch relates, yet, the causes of action must be separately stated. In this case, however, I think the causes of action, without reference to the manner of stating them, and without reference to the necessity of expressing an election in terms between the tort for the destruction of the plates, and the implied assumpsit for their value, must be regarded as arising out of the same transaction, and, there-

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fore, properly unitable in one action. The difficulty, however, is occasioned by the objection that the causes of action are not separately stated. This is said to be the subject of demurrer in *Durkee v. S. and W. R. R. Co.*, 4 Pr. R. 226, per Willard, Justice; and the doctrine is recognized by him again in *Pike v. Van Normer*, 5 Pr. Rep. 172; also in *Getty v. Hudson R. R. Co.*, 8 ibid. 177, per Harris, Justice; and is recognized by him in *Strauss v. Parker*, 9 Pr. Rep. 342; and reasserted in *Van Namee v. People*, ibid. 198; it also recognized in *Moon v. Smith*, 10 How. Pr. Rep. 361, per Dean, Justice, but not acted upon because the demurrer did not assign specifically, as a ground of demurrer, that the causes of action were not separately stated. Contra to these are *Peckham v. Smith*, 9 Pr. Rep. 436, Bacon, Justice; *Robinson v. Judd*, ibid. 378, Marvin, Justice; and *Gooding v. McAllister*, ibid. 128, Welles, Justice—these cases deciding that the demurrer provided by the fifth subdivision of section 144 of the Code has reference to the character or classes of actions, and not to the manner of stating them; and, that advantage can only be taken of the defect by motion to make the complaint more definite and certain. The Supreme Court seems thus to be equally divided on the question—three justices being arrayed on either side—and it cannot be disposed of by weight of authority. Under the old system, a demurrer could be interposed for insufficiency of form or substance, and if the imperfection in form was expressed in the demurrer and demonstrated, the demurrer prevailed (Graham's Pr. 604; 2 R. S. 352, § 4), although the declaration contained enough in substance to entitle the plaintiff to judgment. Unless that practice be sustained under the Code, the omission to state causes of action separately cannot be the subject of demurrer, because it affects the form only of the pleading. I am aware that rule 86 of the Supreme Court requires in all cases of more than one distinct cause of action, defense, counter-claim or reply, that the same shall not only be separately stated, but plainly numbered; but the consequences of the omission are not provided for by the rule itself. By section 176 of the Code, the court are required at every stage

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of an action to disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party, and the application of that section would seem to impose upon courts the duty to disregard a mere matter of form. By section 140 all forms of pleadings previously existing are abolished, and thereafter, the forms of pleadings in courts of record, and the rules by which the sufficiency of the pleadings is to be determined are those prescribed by the Code. The sufficiency of the pleading under consideration is not questioned, but the form or manner of stating it is, and section 144 does not in any of its subdivisions provide against defects of form by demurrer. The fifth subdivision authorizes a demurrer, when several causes of action have been improperly united, and unless that means improperly united by being improperly stated, it has no application to cases where the union of causes of action is correct, but the manner of stating them is improper. It is true that under section 160, when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge is not apparent, the court may require the pleading to be made definite and certain by amendment; but I submit that it might be regarded as an unnecessary exercise of power under this section, to order an amendment by separately stating merely what was *not* indefinite or uncertain. Thus, there arises a difficulty in applying the rule established by either of the class of cases which I have cited; and I feel called upon to regard the rule of the Supreme Court as the paramount consideration in this and kindred cases. That rule requires, as we have seen, the causes of action to be separately stated and numbered; and the omission to comply with it must be regarded as conferring upon the adverse party the right by motion to secure a statement of the causes of action separately with the costs of the motion. Whatever doubt may exist about the propriety of a demurrer for the omission referred to, there can be no doubt that the rule mentioned requires a separate statement of distinct causes of action, and that the practical application of the rule will be to facilitate the trial of issues. There can be no doubt either, that

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the rules of the court should be enforced in all cases, and a departure from them punished, unless some forcible reason be shown to the contrary. For the reasons assigned, I think the omission to state several causes of action separately cannot be the subject of demurrer, and that the plaintiff is entitled to judgment. Ordered accordingly, with leave to the defendant to withdraw the demurrer, and to answer in twenty days, on payment of costs of the issue of law.

The defendant appealed.

*William H. Scott*, for the appellant.

*William W. Badger*, for the respondent.

INGRAHAM, FIRST JUDGE.—The demurrer only states one ground for demurring, viz.: that, in the complaint, several causes of action are improperly joined together. All the causes of action stated in the complaint arise out of one transaction, viz.: for printing a book for the plaintiff, from stereotype plates furnished by her.

The complaint sets out the contract and the payment of money on account of it; that the defendant neglected to perform his contract, suffered the plates to be destroyed, and thereby exposed the plaintiff to loss and damage.

There is nothing in this complaint but what may be said to be founded on contract. The defendant was bound by his agreement to print the book, to take care of the plates, and to return them to the owner; and when he violated all or any of these obligations, he violated the contract. It does not follow, because the plaintiff might have instituted an action for the tort occasioned by the defendant's negligence, that she may not, if she so elects, seek her redress in an action upon the implied contract. She may elect either, and is not confined to the remedy for the tort. These causes of action all arise out of one transaction, and may all be said to be founded on the contract. The 167th section of the Code allows them to be united together.

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It is unnecessary to decide whether an omission to state causes of action separately is a ground of demurrer, because no such ground is stated in the demurrer in this case, and is not, therefore, available. Sect. 145.

Order at special term affirmed, with costs.

JOHN E. DEAN v. FREDERICK ROESLER.

A sealed agreement of lease, signed by an agent in his own name, describing ~~name~~ as "agent" of the owner of the premises, does not bind the owner.

A special agreement under seal, executed by an agent, must appear on its face to be the contract of the principal, or the principal will not be bound.

In an action by lessee against lessor, to recover damages for failure to give possession, the rule of damages is the difference between the yearly value of the premises and the rent reserved.

It is erroneous, in such action, to receive evidence of the amount plaintiff has been compelled to pay to obtain premises, instead of those leased him by defendant.

In an action tried before a referee, evidence on the question of damages, which, under the proper rule was incompetent, was offered and objected to, but was taken down by the referee, subject to the objection; and he afterwards considered it in awarding damages. Exceptions were filed to his decision, one of which was that the decision was "contrary to the law and evidence;" but no exception was taken specifically to the rule of damages adopted.

*Held*, on appeal, that the court would review the decision of the referee in respect to the measure of damages adopted by him.

APPEAL by defendant from a judgment entered on the report of a referee. The action was for damages, for failure of defendant, as lessor, to give plaintiff possession of premises leased.

On the trial before the referee, the plaintiff produced a written lease under seal, the form of which was as follows:

"This is to certify that I have let and rented unto Mr. John E. Dean—[Here follows description of premises, amount of rent, &c.]

(Signed) "G. BOLLET, [L. S.]  
"Agent for D. Roesler."

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There was also proof of a letting by Bollet, as agent of Roesler, independent of this agreement; and evidence was also introduced tending to show that he was duly authorized as such agent.

The facts in regard to the rule of damages followed by the referee appear sufficiently in the opinion of the court.

*T. C. T. Buckley*, for the appellant.

*J. D. McGregor*, for the respondent.

BRADY, J.—I think the agreement in writing, signed by Bollet, did not bind the defendant. Story on Agency, § 147. The agreement must purport on its face to be that of the principal, which is not the case in the contract produced. A more liberal exposition is allowed in cases of *unsolemn* instruments, and especially of commercial and maritime contracts, which are usually drawn up in a loose and inartificial manner. Story, § 154. Accordingly, where an agent, duly authorized, made a note thus, “I promise to pay I. S. or order,” and signed it “Pro C. D., A. B.,” it was held to be the note of the principal, and not of the agent (*Long v. Coburn*, 11 Mass. R. 97); but a note drawn thus, “Four months after date, I promise,” &c., and signed “David Hubbell Hoyt, agent for the Churchman,” was declared to be the promise of the agent, and not of the principal, although Hoyt was duly authorized to make and sign the note. *De Will v. Wulton*, 5 Selden, 570, opinion of Gardiner, J. The rule which prevails in Massachusetts does not, therefore, exist in this state. See, also, *Moss v. Livingston*, 4 Comstock, 208. Bollet, the agent, proved the letting, however, independently of the written agreement. It was for a year, to commence *in futuro*, and was valid for the term by *parol* (*Young v. Dake*, 1 Seld. 463), and the authority of the agent, granted by *parol*, was sufficient to enable him to bind his principal. *Warrell v. Mum & Prall*, 1 Seld. 229. In reference to his authority the testimony was conflicting, and the decision of

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the referee, therefore, is binding. The difficulty, however, of sustaining the judgment arises upon the measure of damages adopted by the referee. He allowed to the plaintiff the difference between the rent of the premises alleged to have been hired by him from the defendant and the rent which the plaintiff paid for other premises, which he was compelled to hire. This was erroneous. The rule of damages is the difference between the yearly value of the premises and the rent reserved. *Trull v. Granger*, 4 Seld. 115; *Schwartzwaelder v. Brace*, Dec. 1847 (Com. Pleas). The testimony as to the rent of the premises secondly hired by the plaintiff was objected to, and the answer taken subject to the objection; but the answer was regarded as evidence by the referee. Exceptions to the decision of the referee, upon which the judgment is founded, were taken, but none specifically to the measure of damages adopted by him. It is insisted that the omission estops the defendant from claiming a review of the judgment of the referee in that respect. In *Hunt v. Bloomer* (3 Kern. 341), the Court of Appeals, per Comstock, J., decided that the exceptions to be taken, within ten days after notice of the judgment, as provided by section 268 of the Code, are those only which, under the former system of practice, were made to the rulings of the court after the evidence was closed, and that a case, if served within ten days, will be of itself a compliance with the first clause of the section, and no other exceptions will be required. The testimony, on which the judgment of the referee as to damages is based, was taken subject to objection, and no exception thereto appears in the case. The exceptions taken after notice do not refer to the admission or use of that testimony by the referee, who, having admitted it subject to objection, did so, doubtless, with a view to examine its admissibility; but the fourth exception being, that the decision of the referee was contrary to the evidence and contrary to law, and the objection to the testimony appearing in the case, and the referee having decided to admit the testimony objected to, we think the question thereon presented must be considered. As already suggested, it

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is fatal, and the report must be set aside, and case sent back to the referee.

**INGRAHAM, FIRST JUDGE.**—I concur with Judge Brady in the order reversing the judgment. I am not prepared to say, however, that the parol evidence of an agreement, which was afterwards reduced to writing, was properly admitted. We are agreed that the sealed instrument did not bind the defendant; and if the parol evidence of the agreement prior to its submission to writing is improper, there is nothing to show the defendant's liability. It is not necessary, however, to discuss that question at present.

Judgment reversed, and case referred back to referee, costs to abide the event.

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**BENJAMIN F. GOODSPEED v. EDWARD and WILLIAM ROBINSON.**

To enable a broker to recover from a vendor of real property commissions upon the sale, he must show, not only an agency in effecting the sale, but also that he was employed by the vendor to negotiate it.

Where, in an action by a broker against a vendor of real property, the only evidence was, that plaintiff negotiated the sale, that the contract was drawn up and signed in the plaintiff's office, the defendants being present at the time, and that the defendants had stated to plaintiff that he must get his commissions from the purchaser—*Held*, that there was no evidence of an employment of plaintiff by defendants, and that a judgment in favor of plaintiff for commissions was erroneous.

**APPEAL** by defendants from a judgment of the Sixth District Court. The action was brought to recover broker's commissions on the sale of three lots of land, formerly the property of defendants. The sale-price of the land was \$9,000, on which the plaintiff claimed one per cent. commissions. It was admitted that this was a reasonable brokerage, if any was due.

The only evidence, on the trial, was the testimony of the pur-

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chaser. He testified that he bought the land through the agency of the plaintiff, and that it was entirely through him that the negotiation was carried on. He further stated, that the plaintiff was a real estate broker; that the contract of sale was signed in plaintiff's office, defendants being there at the time. He further stated, on cross-examination, that plaintiff once told him that defendants said he (plaintiff) must get his commissions from witness, and that witness said, in reply, that he would not pay them, that he left it with plaintiff to get the lots at a certain price, and plaintiff afterwards told him he could not get defendants down to his figure within \$500; that witness then told plaintiff he would give \$9,000, and he finally bought them at that price.

Defendants moved to dismiss the case for want of proof that defendants agreed to pay commissions. The motion was denied, and judgment rendered for the plaintiff.

*Mott and Cary, for the appellants.*

*William R. Martin, for the respondent.*

INGRAHAM, FIRST JUDGE.—The plaintiff has recovered against the defendants for commissions on the sale of real estate as a broker. To enable the plaintiff to recover, he should show an employment by the defendants, and his agency in effecting the sale. Upon the latter point there is no dispute; but the defendants appeal on the ground that there is no proof of such employment. The evidence relied on to establish this fact consisted of the evidence of only one witness. His testimony being uncontradicted, it became a matter of law whether the facts sworn to showed such agency. I am of the opinion they did not, and that the judgment is therefore erroneous. The only facts in evidence are, the sale by the plaintiff, the drawing of the contract in the plaintiff's office, the defendants' presence at the time, and their signing of the contract, and the statement of defendants that the plaintiff must get his commissions out of the purchaser. I do

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not see in these facts anything to warrant the conclusion that the defendants ever employed the plaintiff. Their presence and signature to the contract drawn by the plaintiff are not inconsistent with the supposition that plaintiff was agent for the defendants, and the caution shown by the defendants as to the payment or the commission, and the testimony of the purchaser that he left it with the plaintiff to get the lots at a certain price, with the attempt on the defendants to reduce their price to a sum proposed by the purchaser, rather show an agency for the purchaser than the defendants. Attempting to reduce the defendants' price for the benefit of the purchaser is inconsistent with the duty the plaintiff owed to the vendor if he was his agent, while the whole evidence is perfectly consistent with the supposition that the plaintiff acted as agent for the defendants.

Judgment reversed.

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### JOHN J. MENTGES v. THE NEW YORK AND HARLEM RAILROAD COMPANY.

A man cannot recover damages for injuries occasioned to his property by the negligence of another, when he has himself been guilty of an act of negligence that contributed to the accident.

The horse of the plaintiff escaped from his stable at night, and fell into a cut in the public highway through which the railroad track of the defendants passed.

*Held*, that it was the duty of the plaintiff so to secure his horse that he could not stray into the public streets, and that, if he escaped and any accident occurred to him in consequence thereof, the plaintiff must suffer the consequences.

Whether the defendants would otherwise have been rendered liable, by reason of their failure to put a fence along the line of the cut through which their road passes, *quare a* (a)

APPEAL by defendants from a judgment of the Seventh Dis-

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(a) See *Corwin v. N. Y. & Erie R. R. Co.*, 3 Kernan, 42; also *Duffy v. N. Y. & Harlem R. R. Co.*, Com. Pleas. General Term, July, 1859.

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*Mentges v. The New York and Harlem Railroad Co.*

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trict Court. This action was brought to recover damages for the loss of the plaintiff's horse. The facts out of which the action arose are sufficiently stated in the opinion of the court.

*Odile Close*, for the appellants.

*William Wordsworth*, for the respondent.

**INGRAHAM, FIRST JUDGE.**—This action was to recover from the defendants for a horse, killed by falling from the Fourth avenue to the low ground on which the railway is laid in the cut through the centre of the avenue.

The only evidence, as to the cause of the loss of the horse, is, that he was tied in the stable at night, and in the morning was found lying on the railroad track, where he was killed.

The case appears to have been tried on the supposition that the horse had broken away from the stable and wandered to the place where he fell. The evidence shows the horse was blind of one eye, and could see a little out of the other.

Without examining the questions arising as to the admission of evidence, it appears to me that the plaintiff cannot recover in this action, for the reason that, by suffering his horse to wander in the public streets, he was guilty of an act of negligence that contributed to the accident, and that the general rule, that a plaintiff in such a case must be free from negligence before he can recover for the negligence of the defendants, prevents his recovery.

The case of *Munger v. The Tonawanda R. R. Co.* (4 Coms. 349) contains a full examination of this question of negligence. In that case, it was held that where cattle strayed from the enclosure in which they were placed, and went on the track of a railway, where they were killed, the owner could not recover. The judge says, "The defendants would not have injured the plaintiff, if his oxen had not strayed on the track of the railway; and as they were there without right, in respect to them the law did not enjoin it as a duty on the defendants to take care not to injure them. The want of such care was not, in judgment of

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Mentges v. The New York and Harlem Railroad Co.

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law, a fault to be attributed to the defendants; but if it could be so considered, the plaintiff, having been also in fault, by which he contributed to produce the injury, is not entitled to recover." The principle established in this case is conclusive in defendants' favor, unless the fact of this accident having occurred in a public street alters the rule. Upon this question, the judge in that case says, in relation to such an accident occurring in a public street, "If it appeared that the plaintiff's negligence in any way conduced to bring about the injury complained of, he could not recover, whatever might have been the negligence of the defendants." See, also, the opinion of C. J. Beardsley, in same case, in 5 Denio, 255, where this rule is more fully stated.

The court below appears to have rested its decision upon the negligence of the defendants, in not placing a fence at the cut in the avenue, to prevent animals falling down. This might be sufficient to charge them, if the injury had happened to an animal used on the avenue for the purpose of travel, but it does not relieve the difficulty of the plaintiff's negligence in suffering his horse to wander at night in the streets. But for that negligence, the injury would not have been sustained. It is no answer to this to say that the horse broke loose from his fastenings, and the plaintiff did not know it. It was the plaintiff's duty to see that his horse was so secured that he could not stray into the public streets. If the horse did so escape, it was at the plaintiff's risk, and he must bear the consequences of it.

I deem it unnecessary to pass upon the question whether the defendants were bound to erect a fence at this place, because, even if they were, it would not create a liability for an injury to the plaintiff's horse, which could not have happened if the plaintiff had been free from negligence in taking care of him.

The same questions raised in this case have been before this court on a previous occasion, in *Halleran v. The New York & Harlem R. R. Co.* (2 E. D. Smith's R. 257), and the same views were then expressed by Judge Woodruff. See, also, *Marsh v. The New York & Erie R. R. Co.*, 14 Barb. 364.

The judgment must be reversed.

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Prentiss v. Sprague.

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**SEVERN R. PRENTISS and another v. EDGAR SPRAGUE.**

Where the defence to the plaintiff's claim consists of a counter-claim in favor of the defendant, and the plaintiff's claim is proved, the defendant must substantiate his counter-claim to the entire satisfaction of the justice, before the plaintiff can be charged with any part thereof. Where the counter-claim is for damages, and the justice cannot decide whether the injury should be borne by the plaintiff or the defendant, he has no right to divide the loss between the parties, but, unless affirmatively satisfied of the justice of the counter-claim, must disregard it, and render judgment for the plaintiff's claim.

It is improper for a justice to render judgment while the counsel of one of the parties is summing up the cause.

APPEAL by plaintiffs from a judgment of the Sixth District Court. This was an action to recover for work, labor and materials furnished in repairing a mill belonging to the defendant. The amount of the claim was \$72.68. The mill was originally purchased by the defendant from the plaintiffs. The defendant alleged that they warranted it at the time of the sale. The repairs that were made were rendered necessary by the bursting of the mill-stone sold to the defendant by the plaintiffs, and for the injuries thus occasioned, the defendant interposed a counter-claim. The evidence was conflicting upon the question, whether the bursting of the stone was occasioned by an inherent defect, or by ill usage. The justice returned that he found it impossible to determine whether the stone burst in consequence of a defect therein or not, and that he, therefore, divided the loss equally between the parties, and he rendered judgment for the plaintiffs accordingly for one-half of their claim. From this judgment the plaintiffs appealed.

It also appeared by the return, that the justice, before whom the cause was tried, stopped the plaintiffs' counsel as he was summing up the cause, and told him that he had rendered judgment. This information was communicated to the court, on appeal, in the following postscript attached to the return:

"N. B. While plaintiffs' counsel was summing up the case, I interrupted him, saying, 'that I was fully convinced that, as to the philosophy of the cause of the stone's breaking, no argument

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could clear away the doubts on that matter,' and then told him 'that I had come to that conclusion, and that I had already entered judgment in the case, and stated what the judgment was,' to which he replied, 'that he did not want such a judgment,' and then said, 'I will withdraw the case,' to which I replied, 'I shall let the judgment stand as it is.'

"ANSON WILLIS, *Justice.*"

*William R. Stafford*, for the appellants.

*E. C. Delavan*, for the respondent.

**INGRAHAM, FIRST JUDGE.**—The plaintiffs' claim is for work and labor done in repairing a mill which they had previously sold to the defendant. The defence is a warrantee, and that the work was not well done.

The justice states, in his return, that "finding it impossible to determine from the witnesses whether the stone burst in consequence of a defect in the workmanship or not, I divided the loss between the parties," and he rendered judgment for one-half of the plaintiffs' claim.

From his finding, it is apparent that the justice thought the plaintiffs had done the work, and that the value of it was double the amount of the judgment. For that sum, the plaintiffs were entitled to recover, unless the defendant proved that there was a claim against the plaintiffs under the warrantee. This was the duty of the defendant to prove to the satisfaction of the justice, before he could charge the plaintiffs with any portion of the loss. The justice says, he could not so decide from the testimony, and when he proceeded to divide the loss between the parties he erred. It may be equitable, but a justice's court has no such power. He is not an arbitrator, but is bound by the rules of law in the decision of his cases. When the defendant failed to satisfy him that he had any claim against the plaintiffs, the justice should have rendered judgment for the whole of the plaintiffs' claim.

While the plaintiffs' counsel was summing up the case, the

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justice interrupted him by telling him that he had already rendered the judgment. This was also improper. If a counsel has a right to sum up the case of his client at all, he has a right also to ask that judgment should not be rendered against him, until he has been heard.

Judgment reversed.

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**THE ST. LAWRENCE MUTUAL INSURANCE COMPANY v. DAVID S. PAIGE and MARY PAIGE.**

In an action upon a premium note in a district court, an averment in the complaint, after setting out the note, that "the company did, in the years 1850-1855, make assessments upon the said notes, and required the defendants to pay a certain portion thereof, which assessments the defendants have neglected and refused to pay," is a sufficient averment of the making of assessments, and of a demand and refusal, to show a cause of action. If the defendant wishes more particular information, he must apply to have the pleading amended.

To sustain such an action, it is not necessary for the company to show that they have sustained losses. The statute vests in the directors the right of making assessments whenever they shall deem it necessary, for the honorable and prompt payment of losses, or of the expenses of the company, and the right of deciding when such assessments are necessary.

But only the amount actually assessed can be recovered in such action; and a resolution laying an assessment of — per cent. is a nullity, and can form no basis for a claim upon the note.

The books of a corporation may be proved by any person who was present when they were made, and who knows of his own knowledge that they are correct records of the transactions which they profess to record. The secretary need not be called to verify them himself.

**APPEAL** by defendants from a judgment of the Second District Court. This action was brought on two premium notes. The complaint averred the making of two such notes by Mary Bourne, since become the wife of the defendant David S. Paige, the aggregate amount of which was \$33.25. It then proceeded as follows:—

"And the said plaintiffs further say, that in pursuance of the

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act of incorporation the said company did, in the years 1850 1851, 1852, 1853, 1854, and 1855, make assessments upon the said notes, and required the said defendant, Mary Bourne (now Paige), to pay a certain portion thereof, which assessments the said defendant has neglected and refused to pay, whereby an action hath accrued to the said plaintiffs, to have and demand of the said defendants the full amount of the said notes."

To this complaint the defendants demurred, and assigned, as cause of demurrer: I. That it did not appear that the directors of the company made an assessment on the notes in question. II. That it did not appear there had been any losses by the said company. III. That it did not appear that any demand was made on the defendants for payment before the commencement of the action. The demurrer was overruled, and the defendants' counsel excepted. The defendants then put in their answer, and the cause proceeded to trial.

The plaintiffs produced the notes, as described in the complaint, proved the handwriting of the defendant Mary Bourne, and offered some evidence tending to show that she had since become the wife of the defendant David S. Paige. They then introduced a witness who produced the records of the company, and who testified that he knew them to be the records, that he was present at the meetings whose transactions they recorded, and was afterwards at the office when the secretary made the records up, and that he knew them to be correct. The following resolutions were then read from the records:

"At the annual meeting, April 5th, 1852, it was Resolved, that twenty per cent. be laid on all notes taken prior to July 1st, 1851."

"At the annual meeting, in 1853, it was Resolved, that — per cent. be laid on all insurance notes, &c."

The plaintiffs also introduced some evidence as to the losses which they had been obliged to pay, and the necessity for making the assessments.

At the close of the plaintiffs' case the defendants moved for a nonsuit, on the grounds, 1st, That there was no proof of the

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plaintiffs' incorporation; 2d, That there was no evidence that an assessment was made by the directors on the note in question; 3d, That the books were not properly proved, so as to be admissible as evidence of the transactions of the company. The motion for nonsuit was denied, and the defendants offering no evidence, judgment was given against them for the face of their notes. From this judgment they appealed.

*N. A. Chedsey*, for the appellants.

*Edwards, Man and Flanders*, for the respondents.

~~Mr.~~ **INGRAHAM, FIRST JUDGE.**—The first objection taken in this case is, to the overruling of the demurrer to the complaint.

The grounds of demurrer were: 1. That it did not appear that the directors made any assessments on the notes of defendants.

2. That it did not appear the company had sustained any losses.

3. That no demand was averred.

The complaint contains an averment that the company did, at various times, make assessments upon the notes, and required such payments.

This was sufficient to show a cause of action in this respect. If the defendants required more particular information, they should have applied to the court to have the pleading amended. It is not so defective that the defendants could not understand it, or so defective as not to show that an assessment had been made. These are the only grounds of demurrer allowed by the Code in the district courts.

The alleged defect in the complaint, in not averring that the plaintiffs were a corporation, was not stated in the demurrer as a ground of demurring, and was therefore of no avail.

To the second ground—that it did not appear that losses had been sustained by the company—I need only say, that it was not necessary to aver in the complaint that such losses had been sustained.

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The third section of the amended act of 1849 vests in the directors of the company the right of deciding what amount or portion of the note shall be paid. It provides for the payment, at such times as the directors shall deem necessary, for the honorable and prompt payment of the losses and expenses of the company.

The third ground of demurrer, that there is no demand averred, is not well taken. The complaint says, they required the defendants to pay the amount of the assessments, which they refused. This was sufficient. The demurrer was properly overruled.

The evidence of assessment by the directors on the notes was sufficient. The witness proved, from his own knowledge, that the books produced were the books of the company, and contained the entries of the proceedings of the board, made by the secretary in his presence. It was not necessary that the secretary should be called for this purpose. Any other person possessing the same knowledge was competent to prove that fact, and as the witness testified to the identity of the books from his own knowledge, the books were sufficiently proven to warrant their admission as evidence of the proceedings of the board of directors, and of the assessments by them on the notes in question.

The objection that there was not sufficient proof of the marriage of the defendant Mary to Paige was not taken on the trial. Had it been then made, the defect could have been supplied by further testimony, if necessary. It is too late to make it for the first time on appeal.

By the evidence, it appears that an assessment of twenty per cent. was levied in April, 1852, on all notes taken prior to July, 1851, and, in 1853, that — per cent. be laid on all notes. This is all the evidence as to the amount of the assessments. Under this evidence the plaintiffs could only recover twenty per cent. and interest. A resolution laying a — per cent. assessment was a nullity.

The amount of the notes was \$33.25; twenty per cent. on this  
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amount was \$6.65. This was all that was legally chargeable to the defendants under the resolutions, as stated in the return. The interest would be \$2.45, and the costs below, \$3.50, making in all \$12.60.

The judgment should be reduced to this amount, and affirmed for that sum without costs of appeal.

Judgment accordingly.

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CORNELIUS IVES, assignee, &c., v. WILLIAM GODDARD.

In an action by the assignee of B. & F. against G., the latter interposed, as a set-off or counter-claim, a claim held by him against the assignors B. & F. Upon the trial it appeared that he had recovered judgment therefor prior to this action.

*Held*, that the justice erred in admitting evidence of the original claim on which such judgment had been recovered. The claim was merged in the judgment, and could not be used as evidence of indebtedness.

In the action by G. against B. & F., brought after their assignment to the present plaintiff, evidence of their claim against G. was offered as a set-off, and excluded upon the ground that it had been assigned.

*Held*, that it was properly excluded; and the fact that it had not been set off in such action was no bar to another action on such claim by the assignee.

APPEAL by plaintiff from a judgment of the Marine Court. The action was brought by the plaintiff, as assignee of the firm of Bates & Franc. The defence was a set-off. Judgment was rendered for the defendant, which was affirmed by the general term of the Marine Court, from which the plaintiff appealed. The facts are fully stated in the opinion of the court.

*William R. Stafford*, for the appellant.

*Niles and Bagley*, for the respondent.

INGRAM, FIRST JUDGE.—This action was for goods sold and delivered. The defendant pleaded, among other things, a

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counter-claim of \$225 due from the assignors of plaintiff to them, at the time of the assignment, November, 1855.

Upon the trial, it appeared that the defendant had recovered against the assignors of the plaintiff a judgment for the same counter-claim on the 13th of December, 1855, which action was brought after the assignment to the plaintiff.

The defendants then offered evidence of the original claim for which such judgment had been recovered, which was objected to by the plaintiff, and the objection overruled by the court. Evidence was then received of such counter-claim.

After a recovery of a judgment for that counter-claim against the plaintiff's assignors, the claim became merged in the judgment, and could not any longer be used as evidence of indebtedness. The judgment, then, was the only indebtedness of Bates & Franc to Goddard, and the original claim could not form the basis of a counter-claim. The justice ruled otherwise, and I think he erred in so ruling.

Upon that trial the defendant (then plaintiff) objected to the set-off, offered by Bates & Franc, of this claim now in suit, upon the ground that the same had been assigned to Ives, and could not be used as a counter claim. The same was excluded, and properly, as a defence on the original trial. The defendant now objects to the plaintiff's recovery, upon the ground that the claim sued on should have been set off in the other action.

Where a claim has been thus properly excluded, because it is not legally a set-off in the action, to the plaintiff's claim, such trial forms no bar to another action. *Beebe v. Bull*, 12 Wend. 504.

It would be a monstrous proposition, to hold that a plaintiff may exclude a counter-claim upon the ground that the same had been assigned to a third person, and then, when such third person brings his action to recover it, to say that it should have been allowed as a set-off in the first action, although properly assigned before that action was brought.

Judgment reversed.

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**JOSEPH J. COOK v. THE PRESIDENT, &c., OF THE NEW YORK  
FLOATING DRY DOCK COMPANY.(a)**

The owner of a machine, made by him to be hired out to others for a particular purpose, is under an obligation to make such machine sufficiently strong to answer the purpose intended. If an injury occurs through a defect in it, the owner is liable.

Wherever the law imposes a duty on a man, a neglect of that duty renders him liable to any one injured by such neglect.

The authorities upon this point collated and examined.

and he is equally liable, whether the injury is occasioned by a neglect or disregard of some special obligation or duty due to the injured party, or by a neglect or disregard of a public duty or obligation.

L employed S. and L to repair a ship, and hired the defendants' dry dock for the purpose of making the repairs. S. and L erected a scaffolding upon standards attached to the dock, and belonging to the defendants, and which, by the rules of the defendants, they were required to use for that purpose. Owing to the insufficiency of the standards the scaffolding gave way, and C, who was employed upon it by S. and L, in making repairs, fell upon the dock, and was injured. Held, that the defendants were liable to him in an' action for damages therefor, although there was no privity of contract between him and them.

**APPEAL** by plaintiff from an order granting a new trial. This was an action brought to recover damages for injuries to the person of the plaintiff, occasioned by the falling of a staging. George Law, one of the owners of the steamer Ohio, employed the firm of Simonson & Lugar to repair that steamer, and hired the dock of the defendants for that purpose. The business of the defendants is simply to raise vessels from the water, for the purpose of being repaired, and lower them again when the repairs are completed. They make no repairs themselves.

The Ohio was raised in January, 1851. Simonson & Lugar employed one Edward Hart to put up the necessary staging to be used in repairing the steamer, and it was put up by him un-

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(a) See this case, 18 N. Y. Reports, p. 229.

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der Simonson & Lugar's supervision. As a part of the dock of the company, and for the purpose of erecting scaffoldings, there are placed along the sides upright pieces of timber, called standards. These are fastened to the dock by staples. It is against the rules of the company to drive spikes into the dock; those using it being required to erect their stagings upon these standards. The scaffolding was erected thereon accordingly. On the 14th of January, 1851, while the plaintiff was upon this staging, employed in the repairs of the ship, the staples were by the weight of the staging drawn out, the standards gave way, the staging fell, and the plaintiff was thrown down upon the dock, and seriously injured. The evidence showed that the staples which fastened the standards to the dock were not driven through and clenched upon the other side, as in the opinion of several witnesses should have been done. The evidence, however, as to whether the accident arose from the improper erection of the staging, or from the insecurity of the standards, was conflicting.

The cause was tried before Judge Daly and a jury. He denied a motion made by the defendants for a nonsuit, and left it to the jury to say whether the accident resulted from the improper construction of the standards, or from negligence in the erection of the staging, instructing them that in the former case they were to render a verdict for the plaintiff, otherwise for the defendant. The jury found a verdict for the plaintiff for \$6,000.

The defendants then moved on a case for a new trial, which was granted at special term, by Judge Daly, who delivered the following opinion :

DALY, J.—It is very doubtful whether there was sufficient evidence in this case to support the finding of the jury. I think it appears very plainly from the testimony, that the fall of the staging was owing to the insecure manner in which it was put up by the person employed by Simonson & Lugar to erect it; that it was constructed in such a way as to subject the standard affixed to the plaintiff's dock to an amount of lateral pressure



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which it could not resist, and was never intended to bear. But conceding that there was sufficient evidence to sustain the finding of the jury, that the staging was properly erected, and that the accident was owing entirely to the insecure manner in which the standard was bolted or fastened to the dock, still the plaintiff can maintain no action against the defendants. Law, the owner of the vessel, made a contract with the defendants for the use of their Floating Dry Dock in raising and supporting his steamship while she underwent certain repairs, and he made a distinct and separate contract with Simonson & Lugar, the ship-builders, to do the repairs. They employed one Hart, a rigger and shipwright, to erect the necessary staging to enable them to caulk and copper the vessel, and they also employed the plaintiff, who, with other workmen in their employ, was on the staging when it fell, and caused the injury for which the action is brought. In *Winterbottom v. Wright* (10 Mees. & Welsb. 109), it was held that a coachman, in the employ of a person who had contracted to drive a mail coach along a line of road, could not maintain an action for injuries he had sustained through the breaking down of the coach from *latent* defects in its construction, against a person who, under a contract with the postmaster general, had agreed to provide the coach for the route. The case under consideration is in no respect stronger than the one here stated, and the principle which governed in the decision of the one is equally applicable to the other. If such actions were allowed, the greatest complexity and difficulty would arise in attempting to adjust the respective rights and liabilities of parties. The breaking of a chain cable of a ship, as was suggested in *Winterbottom v. Wright*, in consequence of which the vessel runs aground, would, were such a right of action conceded, entitle every person, injured in person and property by the accident, to bring an action, not only against the manufacturers of the cable, but against the vendors of the iron. The only safe and practical rule is to confine the right of action to those who stand in the relation of contracting parties, or to cases where the injury is caused by the disregard or neglect, of some obligation or duty which the party causing

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it owes to *the party injured*. Thus, where one leaves an excavation in a public street, at night, without proper light or safeguards, through which neglect a passer-by falls in and breaks his leg, an action lies against the party prosecuting the work at the suit of the party injured, because he assumes the obligation to conduct it in such a careful manner as to prevent injury to those who have, in common with himself, a right to the free use of the street; and so an action is maintainable against one who undertakes a public duty, by any one who suffers injury through his neglect in the discharge of that duty, there being an implied obligation to the public to discharge it. But the manufacturer or vendor of an article does not become responsible to every one, into whose hands it may subsequently pass, for a pecuniary loss or injury arising from *latent defects* in the article, or its unfitness for the use to which it is applied. He may be responsible to him for whom he manufactured it, or to whom he rented it for a particular purpose, should it cause bodily harm or injury to the party renting it or his employees, upon being applied to the use for which it is intended, but in such a case the liability of the manufacturer or vendor is founded upon the presumption of fraud arising from his delivering the article with knowledge that it was liable to produce injury from its unfitness for the purposes for which it was purchased. Such was the case of *Levy v. Langridge* (2 Mees. & Welsb. 519; 4 ibid. 837), in which the defendant sold a gun to the father of the plaintiff, with knowledge that it was for plaintiff's use, representing it to be of a particular manufacture, and to be a good, safe and secure gun, when in fact he knew it to be otherwise. The gun, upon being used by the plaintiff, burst, severely wounding and maiming him, and the action was held to be maintainable because the plaintiff, for whose use, as well as that of his father, the gun was bought, was a party contracting, and the representations made to the father was a fraud upon both. As a general rule, such actions must be limited to those between whom there is a contract express or implied, or where a public duty or obligation arises, as in cases analogous to those stated. In the present case, there

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was no privity of contract between Cook and the defendants. Their contract was with Simonson & Lugar. He was in the employ of the latter. Simonson & Lugar erected the staging, or employed the person who erected it, and if they or their employee made use of a defective apparatus attached to the dock, for the use of which Law had contracted with the defendants, the plaintiff must look to Simonson & Lugar. He can maintain no action against the defendants.

From an order granting a new trial the plaintiff appealed to the general term.

*T. E. Tomlinson and Washington Irving*, for the appellant.

I. If the accident occurred through the carelessness of the defendants, it is no answer to allege the carelessness of others.

(a) The court can see judicially, without evidence, that a staple driven into a piece of timber without being clinched, which could only be retained in its place by the cohesiveness of the wood, and to which a rope was to be attached to support in any way a staging, is a grossly careless and improvident structure; the drying up of the wood, the mere oscillation of the staging without any weight, would pull it out.

(b) It is abundantly in evidence, that the defendants knew (or, which is the same thing, the law presumed them to know) that the staples were unsafe, dangerous, and negligently fastened. This brings this case within the class where a knowledge of the imperfection of an article and an appropriation of it renders the maker liable.

The defendants knew that these staples were unfit, and not only caused them to be used, but prevented the use of others.

II. It is a fundamental principle of adjudication, where a loss must fall on one or other of two innocent persons, that he through whose negligence or want of caution the injury has been effected should bear the loss. Here it is proved, found by the jury, and conceded, that without the negligence or want of caution of the defendants, this injury could not have been effected. 1 Taunt.

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76; 5 Barn. & Cress. 750; Tomlin's Law Dictionary, tit. Negligence.

III. This action is not founded in privity of contract, but on negligence. It is an indisputable rule, that the party by whose negligent act the injury is done is liable, and privity of contract has no relation to it whatever. 6 J. R. 90; 1 Cow. Treat. 347; 11 East Rep. 60; 6 Cow. 189; 9 Wend. 1; 11 J. R. 92; 2 Barb. 165; Harrison Digest, 259; 15 Jurist's Ed. Eng. Rep. 1053; 1 Carr. & Marsh. R. 64; Swift's Dig. (Conn.) 566; 1 Harrison Digest, 1464; *Welsh v. Lawrence*, 2 Chit. Rep. 262; 3 Neville & Perry, 239; 1 W. W. & Hodges, 149.

IV. In cases of latent defects, because there is no negligence, a remedy is given on the theory of contract; and on that theory there must be privity. Cow. Treat. 349; Swift Digest, 566; 7 Hill, 101; 3 Den. 357; Harrison Dig. Sup't, 254.

V. There is a duty or obligation, imposed by law on all, to build, work, construct and provide *without negligence*; and, if either is done with negligence, the guilty party is responsible to whomsoever may be injured. 2 Chit. Rep. 262; 3 Nev. & P. 289; 1 W. W. & Hodges, 149; 1 Swift's Digest (Conn.), 53; 4 Den. 464.

VI. The jury found that, by the negligent act of the defendants, the plaintiff suffered loss, and the law imposes such loss on the defendants. See Judge Daly's opinion; 6 Eng. Law & Eq. Rep. 349; 15 Jur. 1010; 2 Burr. Law Dic., tit. Negligence, 741; 1 H. Bl. 158; 5 B. & C. Rep. 750; 9 Wend. 1; 17 J. R. 92; Cow. Treat. 67.

*Benedict, Burr & Benedict*, for the respondents.

I. The plaintiff has no right of action against the defendants. They contracted with George Law to raise the steamer Ohio on their floating dock, to enable him to make repairs. He employed Simonson & Lugar to erect the staging and to make the repairs to the ship. The plaintiff was hired by them to work upon the vessel as a journeyman ship-carpenter,

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and went upon the staging erected by his employers, in order to work upon the ship.

(a) The defendants owed no duty to him. *Winterbottom v. Wright*, 10 Mee. & Wels. 109; *Priesley v. Fowler*, 3 ibid. 1; *Quar-mann v. Burnell*, 6 ibid. 499.

The defendants had no control over Simonson & Lugar, nor over the staging or standards, &c., which for the time being were in the possession of Law, or of those whom he employed. *Mil-ligan v. Wedge*, 12 A. & E. 737.

II. The motion for a nonsuit, which was renewed at the trial after the evidence was closed, ought to have been granted, for the reasons contained in the preceding points, and also because, upon the evidence, the strength of the standard and of the staple was sufficient to have resisted any reasonable pressure that could, if properly used for the purpose they were designed to fulfil, have been brought upon them.

INGRAHAM, FIRST JUDGE.—The defendants, being the owners of the Dry Dock, were employed by the owner of the steamer Ohio to raise her, for the purpose of having repairs done to her. After she was so raised, the owners employed Simonson & Lugar to repair the steamer. Simonson & Lugar made a contract with another person to put up the staging for that purpose. The plaintiff was in the employ of Simonson & Lugar, and while so employed by them in doing the repairs upon the staging, it fell, and the plaintiff sustained the injury for which this action was brought. The evidence showed that the injury was occasioned by the staples, which supported the standards on the floating dock, being wrenched from their places, and not from any imperfection in the staging. The standards were placed there by the defendants, and persons using the dock were compelled to use these standards, as the defendants would not permit other standards to be put up, on account of driving spikes into the dock.

The jury found for the plaintiff. The defendants moved for a new trial, which was granted by the judge who tried the cause,

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upon the ground that the defendants having hired out the dock, they are not responsible for any injury that might happen to others while the dock was under the control of persons to whom it was hired:—from which order the plaintiff appeals.

The only question submitted to us on this appeal is, whether the defendants are responsible for any injuries sustained by third persons, not in their employ, while working for others on the dock.

That no action lies against the defendants, founded upon the contract in favor of any other persons than those to whom the dock was hired, is conceded. This was established by the cases cited, *Winterbottom v. Wright*, 10 Mee. & Wels. 109: *Priestley v. Fowler*, 3 ibid. 1; *Quarmann v. Burnett*, 6 ibid. 499.

But the plaintiff has suggested a distinction between an action upon the contract, and one in a case for negligently building a structure not sufficient for the purposes for which it was hired, and that, in such cases, any one who sustains injury by the negligence may maintain an action.

There can be no doubt of the general principle, that where the law imposes a duty on a man, a neglect of that duty exposes him to liability to any one injured from such neglect. Such was the case of *Townsend v. Susquehannah T. Co.* (6 J. R. 90), for not building a bridge sufficiently strong. In *Panton v. Holland* (17 J. R. 92), it was conceded that the defendant would be liable for injury to his neighbor in digging, if guilty of negligence in so doing. In *Burkly v. Dry Dock Co.* (2 Hall, 151), it was held that the defendants were bound to keep their dock in a condition to be safely used for the purposes for which it was intended, by those who should use it with ordinary care, but that their liability extended no further. So in *The Reclor, &c. v. Buckhart* (3 Hill, 193), the defendants were held liable for negligence in leaving the wall of their building standing after a fire, whereby the plaintiff was injured. The same principle is found in *Regina v. Watts* (1 Salk. 357), *Payne v. Rogers* (2 H. Black. 349), and *Bush v. Steinman* (1 Bos. & Pul. 404). The principle was still more extended in the case of *The Mayor, &c., v. Bailey* (2 Denio, 433). See, also, *Alston v. Grant*, 24 L. & E. Rep. 122.

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In *Eakin v. Brown* (1 E. D. Smith, 43), it was said that the owner of the freehold was liable for injuries resulting from the condition of the freehold caused by his negligence, whether in his actual occupation or not. It was urged, upon the argument, as a distinction between those cases and the present, that the defendants are not responsible to the plaintiff for the injuries sustained by him, because they had rented their dock to third persons, who alone had the control and who alone are responsible for the damage the plaintiff has sustained. Taking this view of the case, and relying upon the cases before cited, the judge at special term made the order granting a new trial, which is now appealed from.

Upon the trial, the judge submitted to the jury the question respecting the defendants' negligence, and also whether the injury was occasioned by negligence in the construction of the machine or in the use of it; exempting the defendants from liability in the latter case. I am of the opinion that this charge was correct, and that the judgment should be sustained. The case of 10 Mee. & Wels. 109, was to recover for injuries arising from latent defects in the vehicle, and not from negligence in its construction.

The rule is stated in the same opinion, viz.: "to confine the remedy by action to those who stand in the relation of the contracting parties, or to cases where the injury is caused by the disregard or neglect of *some obligation or duty which the party causing it owes to the party injured*," or, as is afterwards more fully stated, "*where a public duty or obligation arises*;" and that rule, I think, is a correct one. A man who makes a machine, to be hired out for a particular purpose, is under an obligation to make such machine so as to be sufficiently strong to answer the purpose intended.

In *The Mayor, &c., v. Cunliff* (2 Comst. 163, 180), Judge Strong says: "The court below based the responsibility of the defendants on the general ground, that where one party sustains an injury by the misfeasance of the other, the sufferer may maintain an action for redress against the wrongdoer. That rule operates where the injury is effected directly by the wrong, or where it

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results from the malconstruction of some object while it is in the possession, or under the control, or in any manner used under the agency or instruction of the party originally in fault."

In *Blunt v. Aiken* (15 Wend. 522) a distinction is made between the owner who uses or suffers others to use the property which causes the injury, and a former owner who had been guilty of negligence in the construction; and in that case, it is said, if it had been shown that the defendant had rented (instead of sold) the premises, an action might be maintained against him.

In *Thomas v. Winchester* (2 Seld. 397) a dealer in drugs was held liable to all persons injured, by using as medicine drugs put up by him with a wrong label, although such drugs were not sold to the party injured by the defendant. A distinction which I have above referred to was drawn by the counsel, on the argument of that case, between the liability as arising on the contract as claimed in 10 Mees. & Welsb. 283, and kindred cases above referred to, and that arising on a duty imposed by law.

But, in addition to the fact found against the defendants in this case, of the insufficiency of the dock for the purposes for which it was used, there is here evidence that the defendants required the defective standard to be used, and prohibited the erection of any others upon the dock. This adds much force to the argument that the duty resting on the defendants was to make it sufficiently strong for the purposes for which it was rented. By such a rule, they compelled the use of the defective machine, and should be held responsible for the consequences. The case of *Godley v. Hagerty* (20 Penn. S. Rep. 387) is a strong case in support of the defendants' liability.

The order at special term should be reversed.

**BRADY, J.**—The defendants' business is to raise vessels from the water to be repaired, and to lower them again when the repairs are completed. After the vessel is raised on the defendants' dock, they charge for the *use of the dock* a certain sum per day. They hire the dock to the owners of the vessel, or persons desiring it, for the purpose of repairing, and that species of bailment

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known as *locatio rei* is created. The letter under such circumstances is understood to warrant against all such faults and defects as would entirely prevent the contemplated use and enjoyment of the bailment, or render it dangerous, but not against those which diminish its convenience and appropriateness for the use designed. Story on Contracts (3d ed.), § 730, citing Story on Bailments, § 390. The dock would be useless for the purpose of repairing without staging erected thereon. The defendants furnished the standards to which the staging should be attached, to the exclusion of all others. The design and object of the dock being for public use and the defendants' benefit, operate as an invitation to artisans and laborers to use it in the manner devised by the defendants, and prescribing the manner in which it shall be used, is a guaranty to *all* who so use or employ it, that it is sufficient and safe. When the mechanic is compelled to labor in situations of danger, and is restricted to the mode of averting that danger, the person so restricting him, however remote, should be responsible for injuries arising from the latter's negligence or carelessness. The defendants must be regarded as having *partially erected the staging*, by supplying and erecting the standards to which it was attached, and Simonson & Lugar as having finished it. The part so erected by the defendants was insufficient and gave way, and the plaintiff's injuries arose from such insufficiency. The circumstance mentioned, if it did not create a *quasi* relation of master and servant between the defendants and plaintiff, at least, was a guaranty to the latter that the standard was fit for the purpose and safe. If so, then there was an implied contract between them, independently of the public duty or obligation imposed by law on the defendants, arising from the character of the machine hired.

For these reasons, in addition to those assigned by Judge Ingraham, I think the order at special term should be reversed.

Order granting a new trial reversed.

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Journeay v. Brackley.

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**ALBERT JOURNEY and others v. MATTHIAS BRACKLEY and STEPHEN A. UTLEY, assignees, &c.**

Where a lease of land is made upon any condition—such as the payment of rent—the condition is annexed to the land, and goes with it, and the assignee of the lessee, if he accepts the assignment, takes the estate subject to the condition, and is liable for the payment of the rent as long as he continues assignee.

*It seems* this liability is at an end when he assigns to another, even though he assigns to an irresponsible person for the express purpose of avoiding future liability.

But there is a distinction between an express or specific assignment, by a lessee, of his interest in a lease, and an assignment made by him of all his property for the benefit of creditors. In the former case, the assignee, by accepting the lease, creates a privity of estate between himself and the lessor, and having established that relation, it is immaterial whether he enters upon and enjoys the land or not. But in the case of a general assignment for the benefit of creditors, although the assignees accept the assignment, and enter upon the execution of the trust, whether they will become assignees of a lease, held by the insolvent at the time of the assignment, is altogether at their election.

Such an election must be signified by some unequivocal act. Either the lease must be specifically mentioned in the assignment, or the assignees, after accepting the trust, must have acted in such a way, in respect to the leasehold premises, as to show that they have elected to take the interest which the insolvent before had therein. It will not be implied from the mere acceptance of a general assignment.

The assignees for the benefit of creditors have a reasonable time to ascertain whether the lease can be made available to creditors or not, and during that time may take such steps as they may consider necessary for the purpose of making the property productive. What is a reasonable time for that purpose, considered?

*It seems* that the same principles apply to executors in respect to a decedent's estate. What facts are sufficient evidence of an intention on the part of the assignees in such a case to accept the lease, considered; and numerous cases upon the question collected and examined.

J. leased to T. & R. a store for a term of years. Pending the lease, T. & R. failed, and made a general assignment of all their property, including a stock of goods in the store, to B. & U., who took possession, notified J. that they did not intend to take the building, and would have nothing to do with the lease; but remained there for thirty-six days, selling the insolvent assignor's stock, part of it at private sale, and part of it at auction. At the end of that time, and before the quarter's rent became due, they vacated the premises, and J. retook possession and collected rent from some under-tenants of T. & R., occupying a part of the demised premises. *Held*—

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I. That these facts did not show an election on the part of B. & U. to become assignees of the lease, so as to render them liable for rent. Such an entry upon the demised premises for the purpose of disposing of the insolvent's effects, accomplished in an expeditious and summary manner, is no evidence of an election on their part to accept and make use of the lease.

II. That no action could be maintained against them on these facts for use and occupation. The leasehold estate remained in T. & R., the insolvent assignees. The privity of estate had never been changed; and T. & R. were in legal possession under a valid subsisting lease, the occupation of B. & U. being solely by their permission and authority.

A contract between the parties, either express or implied, is essential to maintain the action for use and occupation; and there can be no implied contract between the owner and the occupant, where a lease from the owner to a third party is shown to be outstanding. Unless the occupant is the assignee under that lease, there is neither privity of estate nor of contract to support an action against him by the owner, for rent.

The Marine Court, at general term, should not reverse a judgment appealed from, and order final judgment in favor of the appellant, where it appears, or may reasonably be presumed from the case presented, or the nature of the controversy, that upon a new trial additional facts might be established sufficient to charge the appellant with liability in the action.

In such a case, on reversing a judgment in favor of the plaintiff, a new trial should be awarded.(a)

**APPEAL** by plaintiffs from a judgment of the Marine Court at general term. This was an action for rent. The plaintiffs, in January, 1854, executed to the firm of Thompson & Roesler a lease of the store No. 14 Maiden Lane, for two years and two months, from the first of March, 1854. The rent was \$7,500 per annum, and was payable on the first days of May, August, November, and February, in each year. By the terms of the lease, Thompson & Roesler were at liberty to relet the premises without the consent of the lessors. It was also provided, that if the premises, or any part of them, should become vacant during the term, the lessors (the present plaintiffs) might re-enter and relet the same as the agents of the lessees, appropriating the amount received, first to the costs, secondly to the rent due, and paying the balance to the lessees. Under this lease Thompson &

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(a) See *Griffin v. Marquardt*, 17 N. Y. Rep. (3 Smith) 28; *Howe v. Julien*, 17 How. Pr. R. 339.

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Roesler entered the store, and relet the basement and lofts at \$3,200 per annum, leaving their rental \$1,300 per annum, or by the quarter \$1,075.

On the 18th day of August, 1854, Thompson & Roesler failed, and made a general assignment for the benefit of creditors, to the defendants. At the time of the assignment they had on hand in the store a large quantity of furs, which were part of the assigned property. The defendants took possession of the store, taking the keys from the assignors, put in a salesman, who sold some of the stock at retail, put up a bill, "selling out by order of assignees," and, on the 8th of September, sold a part of the goods on the premises by auction. An injunction having been served upon them, forbidding them from making any further disposition of the property, the auction was postponed before the goods were all sold; but, on the 20th of September, the injunction having been in the mean time removed, the remainder of the goods were sold at auction, and thereupon the defendants surrendered the premises to the plaintiffs.

Prior to this time, and shortly after the assignment, the defendants notified the plaintiffs that they did not intend to take the building, and would have nothing to do with the lease, and should get the goods out as soon as possible. The plaintiffs thereupon notified the under-tenants of Thompson & Roesler not to pay rent to any person but themselves, and on the 1st of November collected the rent of them, agreeing to hold them harmless against any other persons claiming the same.

This action was brought to recover rent of the defendants for the thirty-two days (from the 18th of August to the 20th of September) during which they occupied the store. The justice before whom the cause was tried gave judgment for the plaintiffs. On appeal to the general term of the Marine Court that judgment was reversed, and judgment was ordered for the defendants. The plaintiffs appealed to this court.

*J. D. and T. D. Sherwood*, for the appellants, contended that the defendants were liable for the rent as fixed by the lease.

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- I. As assignees of the lessees.
- II. For use and occupation.
- III. Under the clause in the assignment requiring them to pay, first, the charges of executing the trust.

To the first point they cited *Armstrong v. Wheeler*, 9 Cow. 88; *Provost v. Calder*, 2 Wendell, 517; *Williams v. Woodward*, *ibid.* 487; *Walter v. Curlys*, 14 *ibid.* 63; *Acker v. Witherill*, 4 Hill, 112; *Van Rensselaer v. Gallup*, 5 Denio, 454; *Van Rensselaer v. Bradley*, 3 *ibid.* 135; *Gravet v. Porter*, 11 Barb. S. C. R. 592; *Durand v. Wyman*, 2 Sandf. 597; *Moffut v. Smith*, 4 Com. 126; *Muir v. Glinsman*, Superior Court general term, January, 1856, Ms.; *Benson v. Bowles*, 8 Wend. 175; *Jackson v. Miller*, 6 *ibid.* 48; *Coles v. Marquand*, 2 Hill, 447; 4 Kent's Com., 96; *Arch. Land. & Ten.* 69, 70.

In support of the second proposition, they cited 4 Kent's Com. 96; *Arch. Land. & Ten.* 140; 1 *Adol. & Ellis*, N. S. 850.

*Hadley, Sterling and Thayer*, for the respondents.

I. Whether a lease is to be deemed property, so as to pass under a general assignment of the lessee's property for the benefit of creditors, depends upon the election of the assignees. *Martin v. Black*, 9 Paige R. 641; *Carter v. Hammell*, 12 Barb. S. C. R. 253.

II. The defendants are not liable, for by the terms of the lease no rent became due during their occupancy. *Child v. Clark*, 3 Barb. Ch. R. 52; *Armstrong v. Wheeler*, 9 Cow. R. 8.

III. The conduct of the plaintiffs, in forbidding Thompson & Roesler's tenants to pay rent to them or their assignees, and in subsequently collecting the rent from them, was an eviction, and would discharge the defendants, if otherwise liable.

IV. The defendants are not liable for use and occupation, for the reason that, at the time of their occupancy, the lease to Thompson & Roesler was still outstanding and unsurrendered.

DALY, J.—The law, in respect to the liability of the assignee of a lessee for rent reserved by the lease, is well settled. Where

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a lease of land is made upon any condition, such as the payment of rent, the condition is annexed to the land, and goes with it, and the assignee of the lessee, if he accepts the assignment, takes the estate subject to the condition, and is liable for the payment of the rent, as long as he continues assignee. Thus, it is said, in Walker's case (3 Coke, 225, b), "if the lessee grant over all his interest, the lessor may have an action of debt against the assignee, with whom there was no contract by deed, forasmuch as the rent issues out of the land, the assignee who hath the land, and is privy in estate, is debtor in respect to the land." Where the assignee accepts the assignment, the privity of estate which existed between lessor and lessee is gone, and a privity of estate arises between the lessor and the assignee. *Copeland v. Stephen*, 1 Barn. & Ald. 598. A privity of estate is created by the demise between the lessor and lessee, that is, a mutuality of obligation and interest in connection with the estate, and though lessor and lessee should both assign, this privity continues between their respective assignees; as privity of estate always exists, as long as the term continues between the party who has the right to enjoy the estate, and the one entitled to the rent or to the performance of the conditions upon which it is to be enjoyed. In virtue of this privity, the assignee was always chargeable in an action of debt, at the suit of the lessor, for the rent which became due, while the privity of estate between them continued (Litt. §§ 460, 461; *Bark v. Dormer*, 1 Show, 187; 3 Mod. 337; *Glover v. Cope*, 4 ibid. 81; *Thursby v. Plant*, 1 Wm. Saund. 241, a, and note 5; *Comyn Land. & Ten.* 400; *Archbold Land. & Ten.* 70), or, if the demise was by deed, and it contained a covenant by the lessee to pay the rent, the lessor might, by the statute of 32 Henry VIII, c. 34, sue the assignee of the lessee upon the covenant, as it is a covenant running with the land. *Brett v. Cumberland*, Cro. Jac. 521; *Parker v. Webb*, 3 Salk. 5; *Palmer v. Edwards*, Doug. 187; *Walker v. Reeves*, ibid. 461; *Webb v. Russell*, 3 T. R. 400; *Walton v. Cronly*, 14 Wend. 64. With us, the distinction between debt and covenant no longer exists, but the ground of action is the general liability of the assignee, if he accepts the

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assignment, and it is immaterial whether he enters upon the land or not. *Baker v. Gosling*, 4 Moore & Scott, 539. If the assignment is made to him and he accepts it, for a conveyance can be forced upon no man, his liability is fixed, and continues as long as the term or estate remains in him. This liability is at an end when he assigns to another, even though he assign to an irresponsible person, for the express purpose of getting rid of his liability, as was the case in *Lekeux v. Nash* (2 Str. 1221); but as long as he stands in the legal relation of assignee, the estate is in him, and he is bound to the lessor for the payment of rent, falling due after he became assignee, or which may become due while he stands in that relation. *Taylor v. Shum*, 1 Bos. & Pul. 41; *Paul v. Nurse*, 8 Barn. & Cres. 486; *Armstrong v. Wheeler*, 9 Cow. 90; *Harmen v. Edwards*, 18 Penn. 9; *Graves v. Port*, 11 Barb. 592.

But there is a distinction between an express or specific assignment by a lessee of all his interest in a lease, and a general assignment made by him of all his property for the benefit of creditors. In the first case, the assignee, by accepting the lease, creates a privity of estate between himself and the lessor, and having established that relation, it is immaterial whether he enters and enjoys the land or not; but in a general assignment for the benefit of creditors, the assignees may accept the assignment, and enter upon the execution of the trust, but whether they will become assignees of a lease, held by the insolvent at the time of the assignment, is altogether at their election, and that election must be signified by some unequivocal act. It must be an act denoting an intention on their part to avail and possess themselves of the beneficial interest which the insolvent lessee had in the lease. Where a lease is expressly or specifically assigned, the assignee, by accepting the assignment, indicates his intention to accept the leasehold estate, with all the conditions to which it is subject. But in an assignment for the benefit of creditors, nothing more is indicated but the acceptance of a trust, to execute which, it may or may not be necessary for the assignee to possess himself of a leasehold interest exist-

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ing in the insolvent assignor. The object of a general assignment, for the benefit of creditors, is, to transfer to the assignees all the property of the insolvent, which may be made available for the payment of his debts; and a term of years in land, burthened with the payment of rents, or the performance of other conditions, may be an interest of no value:—that would yield nothing for the purpose of the trust. To take it, and assume all the liabilities incident to its possession, might be to impose a charge upon the assigned estate, which, instead of being a benefit, might diminish the amount to which the creditors would otherwise be entitled. It is not to be presumed, therefore, that an assignee, for the benefit of creditors, takes, in his representative character, property of this description, and charges himself or the assigned estate with all the conditions attached to it, in consequence of becoming such assignee. Something more is required. The lease must either be specifically mentioned in the assignment, or, after accepting the trust, the assignee must have acted in such a way, in respect to the leasehold premises, as to show that he has elected to take the interest which the insolvent lessee had in them.

This distinction, between the liability of a specific assignee of a lease and an assignee for the benefit of creditors, appears to have been first pointed out by Lord Kenyon, in *Bourdillon v. Dalton*, 1 Espin. 234. "The assignees," he says, "certainly take this term under the assignment, but if it be what the civil law calls 'damnosa hereditas,' an interest producing nothing to the bankrupt's estate, they may abandon it." Afterwards, Lord Ellenborough, in *Turner v. Richardson* (7 East, 335), referred to this decision of Lord Kenyon, and said, that "the assignees of a bankrupt are not bound to take property of the bankrupt, which, so far from being valuable, would be a charge to the creditors, but they may make their election; if, however, they do elect to take the property, they cannot afterwards renounce it." But the point came up for more mature consideration in *Copeland v. Stephens* (1 Barn. & Ald. 594), and it was distinctly determined, that the general assignment of a bankrupt's personal estate, un-

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der his commission, does not vest a term of years in the assignees, unless they do some act to manifest their assent to the assignment, as it regards the term and their acceptance of the estate. Three points were considered by Lord Ellenborough, in delivering the judgment of the court: *first*, whether the interest of the bankrupt, as lessee, passed immediately to the assignees, defeasible upon their actual refusal to accept it; *secondly*, whether it passed immediately to them, defeasible upon their neglect or forbearance to do some act manifesting their acceptance; or, *thirdly*, whether its effect was suspended until their acceptance. The two first propositions were answered in the negative, and it was held, that the estate remains in the bankrupt, until acceptance by the assignees, subject to their right to have the land by their acceptance of the assignment, and thereby to give effect to the deed, and vest the estate in themselves. The assignment in this case was under the bankrupt and insolvent debtor's act, and the assignees, like receivers, were officers of the court; but it was held in *Carter v. Warne* (4 Car. & Pay. 191), and in *Pratt v. Leaven* (1 Miles [Penn.], 358), that there is no difference, in this respect, between assignees under a voluntary assignment by a debtor and assignees or trustees appointed under insolvent or bankrupt acts. The doctrine of *Copeland v. Stephens* and the law as above laid down have been recognized in numerous cases, and may now be regarded as firmly established. *Thomas v. Pemberton*, 7 Taun. 206; *Hastings v. Wilson*, 1 Holt, 290; *Page v. Godden*, 2 Starkie, 309; *Hill v. Dobie*, 8 Taun. 325; *Lindsey v. Limbert*, 2 Car. & Pay. 526; 12 Moore, 209; *Carter v. Warne*, 4 Car. & Pay. 191; *Clark v. Hume*, Ry. & Moo. 207; *Martin v. Black*, 9 Paige, 641; *Carter v. Hammett*, 12 Barb. 253; *Pratt v. Leaven*, 1 Miles, 358.

The same principle, in effect, has been recognized in the case of executors. Where they have no assets, they are not liable to the lessor, though they have taken possession of leasehold premises for the purpose of letting them, if the possession has been productive of no profit, and they have, after keeping it a reasonable time for that purpose, offered to surrender it to the

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lessor. *Remnant v. Bainbridge*, 8 Taun. 191; *Wilkinson v. Canard*, 8 Anst. 909; *Reid v. Lord Tenderden*, Tyrwh. 118, 120; 2 Wms. on Execut. 1493, and has also been recognized in the case of receivers, *Martin v. Black*, 9 Paige, 641.

In *Carter v. Warne*, *supra*, and *Lindsey v. Limbert*, *supra*, it was held, that the assignees have a reasonable time to ascertain if the lease can be made available for the benefit of creditors or not, and during that time may take such steps as they may think necessary for the purpose of trying to make the property productive. They may offer the premises for sale (*Hasling v. Wilson*, and *Turner v. Richardson*, *supra*), or put an agent in possession for the purpose of letting them (*Lindsey v. Limbert*, 12 Moore, 209), or they may go themselves, or place persons temporarily upon the premises to take charge of the goods of the insolvent, and dispose of them there (*How v. Kennett*, 3 Adol. & Ellis, 659), and may even release an under-tenant, if, within a reasonable time, they notify the lessor that they do not intend to accept (*Hill v. Dobie*, *supra*), without assuming the character of assignees, or charging themselves or the assigned estate with the payment of rent.

But, assuming the management of a farm (*Thomas v. Pemberton*, *supra*), or selling the leasehold interest at auction and receiving a deposit on the sale, and then neglecting to enforce the contract against the purchaser (*Haslings v. Wilson*, *supra*), or executing an assignment of the lease to another (*Page v. Godden*, *supra*), or entering for the purpose of disposing of the insolvent's effects, and so using or occupying the premises as to diminish their value, and dealing with the premises as if they were their own (*Carter v. Warne*, *supra*), or carrying on the trade of the insolvent the same as before, for the benefit of creditors (*Clark v. Hume*), have been held to be acts showing an election to take the term and assume the legal relation of assignees of the lease.

I should not have felt it necessary to have gone so minutely into the examination of this question upon the authorities, but for a recent decision of the Superior Court (*Muir v. Glinsman*, Jan. General Term, 1856), in which an assignee for the benefit

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of creditors, who went into possession of leaschold premises of the insolvent towards the end of a quarter, and remained in possession for a few days after it terminated, was held responsible to the lessor, as assignee of the lease, for the whole quarter's rent. That case differed from the present in two respects. The assignee there was in possession when the quarter's rent fell due, which was not the case here; and the action there appears to have been an equitable action, for a decree that the assignee pay the quarter's rent out of funds of the insolvent, adjudged to be in his hands; whereas no such judgment was given here, nor had the Marine Court the power to render such a judgment. It may have been, moreover, that there were facts in that case showing an election on the part of the assignee to accept the lease, or, by the nature of the trust created, the assignee may have been chargeable in equity for neglecting to apply assets in his hands to the payment of the rent. But, from the opinion of the court, which was delivered by Mr. Justice Hoffman, the decision was not put upon any such ground; and the liability of the defendant was deduced from the fact that he was an assignee for the benefit of creditors. He was held, by virtue of that relation, to be in privity of estate with the lessor, and his neglect to pay the rent was treated as a breach of the covenants contained in the lease. The distinction between an express or specific assignee of a lease and an assignee for the benefit of creditors was not noticed, nor the numerous authorities establishing that distinction referred to or considered. It is obvious that Mr. Justice Hoffman did not consider that there was any difference, as all the cases referred to by him, with one exception (*Morris v. Parker*, 1 Ashmead, 187), in which this question was not before the court or passed upon, are all cases relating to express or specific assignment of leases, disconnected with any trust or other obligation on the part of the assignee, except that derived from the acceptance of a direct assignment of a lease. If I understand this case as determining that an assignee for the benefit of creditors, is, by merely becoming such assignee, in privity of estate with the lessor of the insolvent lessee, and chargeable with the

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performance of all covenants contained in the lease while he continues such assignee, then, with all possible respect for the eminent tribunal by which that judgment was rendered, I am constrained to say that it is in conflict with the uniform course of judicial decision in this country and in England. Such would certainly seem to be the opinion of Mr. Justice Hoffman; and, if the court agreed with him, I cannot concur in the correctness of the judgment.

In the case before us, the assignment to the defendants was made on the 18th of Aug., 1854, and on the evening of that day the keys of the store occupied by the insolvent were delivered to the assignees. Immediately after they took an inventory; the goods were got ready for auction; they dismissed the salesmen, but continued to sell goods as customers came in, and a notice was posted up on the outside of the building, "Selling off by order of the assignees." On the 8th of September a portion of the goods were sent to auction. On the 9th of September an injunction was served upon the defendants, restraining them from selling the goods, which was dissolved on the 19th, and the day following, the residue of goods were sent to auction; and on the 23d, before the quarter's rent was due by the lease, the defendants vacated the premises. Soon after the assignment, and before the injunction, one of the defendants told one of the plaintiffs that they did not intend to take the building, and would have nothing to do with the lease; that they "would occupy the building no longer than they could help; would get the goods right out, and close the business as soon as possible;" and, before the quarter fell due, one of the plaintiffs told one of the under-tenants not to pay rent to Thompson & Roesler, the insolvent assignors; and the plaintiffs collected the quarter's rent when it fell due, on the 1st of Nov., from two of the under-tenants, and entered into an agreement, in writing, with each of them, to keep them in peaceable occupation until the first of May following, upon their paying their rent to the plaintiffs, and also to save them harmless against any one claiming rent from them.

There is nothing in this state of facts to show an election, on

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the part of the defendants, to become assignees of the lease. In *Hill v. Dobie, supra*, the assignees did much more to signify their acceptance of the lease. They released an under-tenant from all liability under it, before notifying the lessors of their intention not to accept. It was contended that, by so doing, they had exercised dominion over the property ; but having notified the lessors within a reasonable time, that is, a month after the assignment, that they did not accept, it was held that they were not liable as assignees. In *Wheeler v. Bramah* (3 Campb. 840) the assignees left the bankrupt's effects upon the premises nearly a year, and, for the purpose of preventing a distress, they paid the rent in arrear for three quarters, when it was agreed between them and the landlord that the lease should be put up ~~at~~ auction, to see if it was worth anything ; the assignees declaring that, otherwise, it was not their intention to take the premises. The bankrupt's effects were sold at auction upon the premises, and at the same time the lease was put up, but there were no bidders ; and it was held that the defendants had not made themselves assignees of the term. In *How v. Kennett* (3 Adol. & Ellis, 659) the assignees put in a shopman, who carried on the business, accounting to them for a week ; the shop was shut, though the man slept at the house, for the purpose of taking care of the goods, for five or six weeks, when the property remaining on the premises was sold at auction, by the order of the assignees ; and it was held that the entry of the assignees was merely for the purpose of selling the insolvent's goods, and was not such a possession as would constitute a tenancy, and render them liable to the landlord in an action for use and occupation.

*Pratt v. Leaven* (1 Miles [Penn.], 358) was a case more nearly resembling the one under consideration. There the assignees, under a voluntary assignment for the benefit of creditors, containing no notice of the lease, took possession of the goods in a store, which, as in this case, was part of the demised premises, the key of which they took. They took an inventory of the goods, and, eleven days after the assignment, when the quarter's rent was more than half expired, they made a public sale of the goods

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upon the premises. About a month after, on the day when the quarter's rent fell due, they paid the rent of that quarter to the lessor, and tendered him the key, which he refused to accept. He brought an action against them for the rent subsequently accruing; but the defendants had judgment, the court being of opinion that they were not liable as assignees of the lease. The delivery of the key was regarded as a mere symbol of the possession, and a giving of the control of the goods in the store only. The court said that the taking of the inventory and the public sale of the goods on the premises were not an entering into the premises demised, so as to bind the defendants as assignees of the lease; and that, as the payment of the quarter's rent was accompanied with a tender of the key, and a statement on the part of the assignees that they had made no other use of the premises than to make a public sale of the goods, it could not be deemed as an implied election to take the lease under the assignment; nor could the assignees in any way be held responsible for any rent which accrued subsequently.

Upon these authorities, I think it is very clear that the defendants did nothing to show that it was their intention to become assignees of the lease. Their entry upon the premises was for the temporary purpose of disposing of the insolvent's effects, and they did so in an expeditious and summary manner. They notified the plaintiffs, within twenty days after the assignment, that they would have nothing to do with the lease, and informed them for what purpose they had gone upon the premises; and that the plaintiffs did not regard or treat them as assignees of the lease, or as having succeeded to the rights and interests of the lessees, is evident from their notifying the under-tenants not to pay rent to the lessees, collecting rent from the under-tenants, and entering into the agreement to save them harmless. I can see nothing in the defendants' acts to charge them as assignees of the lease, or to make them responsible for the performance of the covenants contained in it. It has been held that where one, not the lessee, is in possession of leasehold premises, it will be presumed that he is in as assignee of the original tenant. *Du-*

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*rand v. Wyman*, 2 Sandf. S. C. 598. If the defendants could be regarded in possession at all, which I very much doubt, as the lessees continued in the store as long as the defendants were there, assisting in getting the goods ready for auction, this presumption, like every other, would be overcome, when it was shown for what purpose they went into possession. It was held, in *Williams v. Woodward* (2 Wend. 487), that the party in possession may overcome the legal presumption, by showing that he is not assignee; and the rule is thus carefully stated in *Acker v. Witherill* (6 Hill, 112): "Where a man is shown to be in possession of leasehold premises, *without anything more*, the presumption of law will be that he is in as assignee of the original tenant."

In the present case, the judgment was given for the time that the defendants were adjudged to be in actual occupation, that is, from the 18th of Aug. to the 23d of September, at the rate of the rent reserved by the lease; and it remains but to consider whether, if the defendants were not assignees of the lease, they were liable to the plaintiffs for use and occupation for the time they were adjudged to be in possession of the store.

I confess I do not see how it is possible for the plaintiffs to sustain an action against the defendants for use and occupation. If they were not assignees of the lease, then, according to the ruling (*Copelund v. Stephens*, 1 Barn. & Ald., *supra*), the leasehold estate remained in Thompson & Roesler, the insolvent lessees. The privity of estate had never been changed. Thompson & Roesler were in legal possession, under a valid subsisting lease, whether they were in actual occupancy or not being immaterial; though, in my judgment, they were quite as much so as the defendants. If the defendants occupied, they could only do so rightfully by the permission and authority of the lessees. The lessors could give them no such authority; they had reserved the right, by the lease, to enter and relet as the agents of the lessees, if the premises should become vacant during the term; but they did not become vacant until the 23d of September, when both the lessees and the defendants left the store. The action

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for use and occupation, whether in debt or in assumpsit, is maintainable only where there is a contract between the parties, express or implied. *Birch v. Wright*, 1 T. R. 378. "An implied contract," in the language of Lord Denman, in *Gibson v. Kirk* (1 Ad. & El. N. S. 850), "is raised by law from the fact that land belonging to the plaintiff has been occupied by the defendant with the plaintiff's permission." The plaintiffs here could enter into no contract with the defendants for the occupation of the premises, and therefore no such contract could be implied. It is essential, in any action for use and occupation, that the relation of landlord and tenant should exist. *McKean v. Whitney*, 3 Denio, 455. If the defendants had become the assignees of the lease, that relation would exist between them and the plaintiffs (Arch. Land. & Ten. 69); but it could not exist while the ~~term~~ still vested in the lessees, *Thompson & Roesler*. There is an end to all presumption of an implied contract between the actual occupant and the owner, or of the relation between them of landlord and tenant, the moment a lease of the premises from the owner to a third party is shown to be outstanding. Unless the actual occupant is the assignee under that lease, or can be presumed to be, there is no privity, either of estate or of contract, to support an action against him by the owner for rent.

The general term of the court below, therefore, were right in holding that this judgment could not be sustained; but they erred in giving judgment for the defendants. They should have reversed the judgment and ordered a new trial; for the plaintiff might show, upon a new trial, acts of the defendants amounting to an acceptance of the lease. On the trial, he was not required to go any further, as the court gave him judgment upon the case he made out. The case, therefore, must go back to the general term, that they may give the proper judgment.

Ordered accordingly.

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Smith v. Woodruff

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WILLIAM B. SMITH, receiver, &c., of Aaron Woodruff, *v.* SAMUEL B. WOODRUFF.

A. W., being insolvent, assigned a stock of goods to G., one of his creditors, for \$1,000, upon condition that G. would deduct his claim therefrom, and pay the balance to the other creditors. G. sold the property to S. W. upon the same terms—the latter, however, agreeing to pay the balance to the creditors of A. W. only in case they would accept it in full, and discharge A. W. *Held*—

- I. That this sale was to be regarded as an assignment for the benefit of creditors, and was void because it appropriated only a specified property, and not the whole of the debtor's estate.
- II. That the balance in the hands of S. W., after the payments of the claim of G. and some others, was to be regarded as money had and received to the use of A. W.'s creditors, and could be recovered by them from him.
- III. But that no action could be maintained therefor by a receiver of the property of A. W., appointed on the application of one of his judgment-creditors. Neither A. W. nor any one claiming under him had any right of action against S. W. therefor. (a)

APPEAL by defendant from a judgment of the Marine Court. This action was brought by the plaintiff, as receiver of the property, &c., of Aaron Woodruff. Aaron Woodruff, being insolvent and owing about \$1,700, sold his stock of goods to one A. D. Gale for \$1,000. Gale was one of Woodruff's creditors, and, by the agreement between them, Gale was to pay himself out of the \$1,000, and apply the balance to the payment of the rest of Woodruff's debts. Gale thereafter sold the property to the defendant, Samuel B. Woodruff, for \$1,000, he agreeing to pay out of the sum Mr. Gale's claim, and to apply the balance to the payment of the other creditors, provided they would thereupon release Aaron Woodruff. He made some payments under this arrangement, but at the time of this action had an admitted balance of about two hundred dollars in his hands. The plaintiff, having been appointed receiver of the property of Aaron Woodruff, in supplementary proceedings taken out against him by a judg-

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(a) See *Porter v. Williams*, 5 Seld. 142, *contra*.

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ment-creditor, brought this action to recover that balance of two hundred dollars in Samuel B. Woodruff's hands. Judgment was rendered for the plaintiff by the justice who tried the cause, and it was affirmed by the general term of the Marine Court. The defendant appealed.

*D. T. Walden*, for the appellant.

*S. S. Freeman*, for the respondent.

BRADY, J.—Aaron Woodruff sold his stock of goods to A. D. Gale for \$1,000, and, by the agreement of sale, Gale was to take out the amount of his debt against Woodruff, and pay the balance of the \$1,000 to the other creditors of Woodruff. The defendant, hearing of the sale, bought the stock from Gale on similar terms, and partially, though not entirely, carried out the arrangement. He was to pay over the surplus, after payment or settlement of Gale's claim, to the creditors, provided the creditors would accept that surplus and release Aaron Woodruff from all his liabilities. It does not appear that Aaron imposed any conditions upon his creditors in the agreement made with or directions given to Gale, but appropriated to them the surplus after the payment of Gale's debt. Gale never acted upon that agreement or appropriation further than to sell the stock, which he bought from Aaron; and Aaron states that the defendant, when he bought, agreed to carry out the arrangement which he (Aaron) made with Gale.

Regarding the transaction between Aaron and the defendant as an assignment for the benefit of creditors, it would be void because of the conditions annexed. *Grover v. Wakeman*, 11 Wend. 187. Or, regarding it as an assignment for the benefit of creditors without conditions imposed, it would be equally void, because it is the appropriation of specified property, and not the whole of the debtor's estate (*Grover v. Wakeman, supra*), aside from the doubt, which may well be entertained, whether a trust, *ex nomine*, for the benefit of creditors, can be created by

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parol. But there are other considerations which command attention. It is well settled, that if A deliver money to B, to be paid over to C, the latter may recover it in an action for money had and received. *Farmer v. Russel*, 1 Bos. & Pul. 296; *Weston v. Barker*, 12 John. 276; *Tiernan v. Jackson*, 5 Peters U. S. R. 598; *Nelson v. Blight*, 1 Johns. cases, 305. It is said that there must be some assent, express or implied, to hold the money thus had and received for the purposes designed (*Williams v. Everett*, 14 East. 582), to prevent accruing equities between the parties, which might otherwise be interposed, to frustrate the contemplated appropriation; but that question does not arise in this case. The defendant promised to apply the money as directed, and did so as to all of the surplus except \$200. It is true, that the directions of the assignor or debtor were general, and that the proportion which each creditor was to receive was not mentioned; but that does not destroy the obligation or duty, because the law will presume the appropriation to have been equally among the creditors in the proportions which their respective demands bore to the surplus. The defendant was, by his agreement, liable to the creditors of Aaron for this proportion, and the debtor could not maintain against him an action to recover the money so had and received to the use of the creditors. It had ceased to be his property, and the defendant had, by express promise, incurred a liability to the creditors. It will be found, on examination, that *Weston v. Barker* is analogous in the facts to those proved herein, while the principle applicable to both is the same. The debtor, not having any demand, right of action, or property, against, or in the hands of the defendant, the receiver acquired by his appointment no right to any property in the hands of the defendant or under his control, and the judgment of the court below was erroneous. The extent of the defendant's liability is the proportion to which the plaintiff is entitled on the principles herein enunciated, and for which the defendant may be sued by the judgment creditor at whose instance the receiver was appointed. It may be said with great propriety, that if it appeared that the defendant had settled with

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the creditors of Aaron on terms which would leave a sum in his hands belonging to Aaron, that to the amount thereof the receiver could recover. There is, however, no exposition of that kind herein.

Judgment reversed.

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**BENJAMIN P. CARPENTER v. MICHAEL DOODY and DAVID DRADDY.**

The surety of a constable upon his official bond is liable in damages for the constable's neglect to return an execution within the time required by statute. The condition of such bond, that the constable "shall in all things well and faithfully perform and execute the duties of the office of constable, without fraud, deceit, or oppression," requires two things:—*First*, That he shall perform the duties of his office;—*Second*, That he shall do so without fraud, deceit, or oppression. The former is for the benefit of the creditor, the latter for the protection of the debtor. And in an action by the former upon the bond for the official neglect of the constable, *e. g.*, to return an execution within the requisite time, it is not necessary to show fraud, deceit, or oppression.

In such an action, a judgment previously recovered against the constable for the same neglect is *prima facie* evidence of the amount for which the surety is liable. In an action against a constable for a neglect to return an execution, the plaintiff's damages are *prima facie* the amount of the execution: but the constable may show that the plaintiff has sustained no damage, or less than the full amount of the execution, and limit the recovery against himself accordingly.

The provisions of the Revised Statutes (2 R. S. p. 449, § 142, 4th ed.), rendering a constable liable in all cases in the amount of the execution, for a neglect to return the process within the required time, do not apply to constables in the city of New York.(a)

MOTION by plaintiff for judgment upon a case made. This was an action against the defendant Michael Doody, as principal, and David Draddy, as surety, upon a bond given by the former as constable of the city of New York, for the faithful performance of his duty as such constable. The condition of the bond was in these words:

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(a) See *Brown v. Jones*, *ante*, page 204.

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"Now the condition of this obligation is such, that if the above bounden Michael Doody shall in all things well and faithfully perform and execute the duties of the said office of constable without fraud, deceit, or oppression, then this obligation shall be void; otherwise remain in full force and virtue."

On the 16th of January, 1859, the plaintiff recovered judgment against one William Perrine for the sum of \$64.13 damages and costs in the Third District Court, and an execution was issued thereon, and delivered to the defendant Michael Doody. He neglected to return the execution within the time required by law, and an action was thereupon brought against him to recover damages therefor, and judgment was rendered against him in that action for \$117.02 damages and costs. This judgment not having been paid, this action was brought against both defendants on the bond. The cause was tried before his honor Judge Daly without a jury, by whom judgment was rendered for the plaintiff for \$120.67, the amount of the judgment against the defendant Doody, with interest, subject to the opinion of the court at general term, upon a case to be made by the plaintiff. On a case presenting these facts, the plaintiff now moved for judgment.

*W. C. Carpenter*, for the plaintiff.

I. A constable is liable for neglecting to return an execution within the time limited, and the party in whose favor such execution issued is entitled to recover against the constable, for such neglect, the amount required to be levied by him in virtue of such execution, and it is not necessary to show moneys collected by him to sustain the action.

II. The responsibility of the surety is co-extensive with the responsibility of the constable, and the surety is liable whenever the constable is liable to a party in whose favor an execution has been delivered to him. Laws rel. to City, p. 52; 2 R. S. p. 253, § 142-159 (4th ed.); *Gardner v. Jones*, 20 Johns. R. 356; Cowen's Tr. Part I, pp. 40 and 41 (2d ed.); *Sloan v. Case*, 10

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Wend. 370; *Skilling v. Gender*, 12 ibid. 306; *People v. Schuyler*, 4 Com. 173.

III. The bond given by the defendant Doody is sufficiently broad to cover the present case. It is intended to cover all his acts done under color of process, and covers nonfeasance as well as misfeasance.

*John Graham*, for the defendant David Draddy.

I. The defendant Doody was not liable to the plaintiff in damages for his failure to return the execution. § 142 of 2 R. S. p. 449 (4th ed.) relates exclusively to constables out of the city of New York.

II. Supposing him, however, to have been liable, it does ~~not~~ necessarily follow that his surety is also. For the latter is on the bond liable only for such misconduct or neglect of the constable as is tainted with fraud, deceit, or oppression. There was no evidence here of either, nor any charge of anything except a technical failure to return the execution within the twenty days fixed by statute.

INGRAHAM, FIRST JUDGE.—The plaintiff recovered a judgment against Doody, a constable, for not returning an execution delivered to him. He now sues on the official bond to recover the amount of such judgment from the surety.

The constable is liable for any neglect in the discharge of his duties; and where the statute imposes on him a duty (such as returning an execution within a given time) and he neglects to perform such duty, he is liable. It does not follow, however, that he is in all cases liable for the whole amount of an execution in a case where he neglects to return it. The provisions of the Revised Statutes on this subject, as applicable to justices' courts, do not apply to the courts in New York; and although *prima facie* the plaintiff's damages are presumed to be the amount of the execution, the constable, like the sheriff, might show that no damage or less than the full amount had been sustained, and limit the recovery thereto. The recovery against the constable

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is *prima facie* evidence of the amount for which the surety is liable. In this case no evidence is given to contradict that presumption, and I conclude that to be the proper amount, if any liability of the surety exists therefor.

Is the surety liable for this neglect of the constable?

The condition of the bond is, "that he shall in all things well and faithfully perform and execute the duties of the office of constable, without fraud, deceit, or oppression." This condition requires two things—one, to perform the duties of the office, and, secondly, to perform such duties without fraud, deceit, or oppression; the first part intended for the protection of the creditor, the second for the protection of the debtor. The constable, if he faithfully perform the duties of his office in regard to an execution, would not incur any liability to the creditor, even if guilty of oppression towards the debtor. For such oppression the debtor has the cause of complaint.

The 149th section of the act (2 R. L. 1813, ch. 86), which provides for the taking of this bond, also provides that said bond may be put in suit, in case of any recovery for any default or misconduct in office. A default in office is a non-compliance with the statute in discharging any of the duties imposed. Fraud is not necessary to enable a party to recover for a default; but the mere neglect or omission to do an act or duty which the law imposes is a default on the part of the constable, for which he is liable.

The same questions which are discussed in this case were raised in *The People v. Brush* (6 Wendell, 456). In that case the officer was the sheriff, and the condition of his bond was the same as this. Mr. Justice Marcy says, "The condition of the bond may be broken without any positive act of fraud, deceit, or oppression." And again, "His neglect of duty is a breach of the bond, although it should not involve in it any positive act of fraud, deceit, or oppression."

The condition of the defendants' bond was sufficient to hold the defendants liable for any neglect of duty imposed by statute, whether such neglect was accompanied with fraud or not.

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The statutes (Seas. Laws, 1837, ch. 461, and 1851, ch. 514) make the executions in these courts returnable at a certain period, and the neglect to return them is a default on the part of the officer, for which he and his sureties may be made liable.

The plaintiff is entitled to judgment.

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### MARK ISAACS v. THE BETH HAMEDASH SOCIETY.

The president and two of the trustees of a corporation signed an agreement submitting a controversy, in which the corporation was interested, to arbitration, and all the trustees attended before the arbitrators, and took part in the trial of the controversy as witnesses, &c.

*Held*, a sufficient submission to bind the corporation by the award.

The assent of a corporation to a submission may be inferred from circumstances.

Where the submission of a controversy to arbitration provided that the decision of "a majority" of the arbitrators should be binding, and the bond provided that the award should be subscribed "by the said arbitrators," *held*, that the submission and bond must be taken together, and that an award signed by two of the three arbitrators was valid.

The parties, to a controversy submitted to arbitration, their witnesses, and the arbitrators chosen, were all of the Jewish persuasion. The meeting of the arbitrators for the trial of the cause was held on Sunday, and the award was on that day drawn up and signed; but it was dated the next day, and was not until then delivered to the parties.

*Held*, that the award was valid.

**APPEAL** by plaintiff from an order of the special term, denying a motion to vacate a judgment entered on an award of arbitrators. By the affidavits on which this motion was founded, it appeared that the plaintiff had preferred a claim against the defendants, a Jewish society, for services and disbursements in making passover bread, under a contract with them. He had brought a suit in the Marine Court upon this claim, when it was proposed, on behalf of the society, that the controversy should be submitted to arbitration. This was agreed to on the part of plaintiff, and an agreement of submission, together with a bond,

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pursuant to the provisions of the Revised Statutes, were drawn up and executed; a hearing was had before the arbitrators, and an award made in favor of the plaintiff. He having entered judgment upon the award, a motion was made to vacate that judgment. The objections taken to the award were: 1. That the submission was insufficient to bind the defendants, there being no resolution of the board of trustees authorizing an arbitration; 2. That the award was signed by only two of the three arbitrators; and 3. That the arbitrators held their meeting upon Sunday.

The motion was denied at special term, the following opinion being rendered:

INGRAHAM, FIRST JUDGE.—The agreement to submit this case to arbitration was signed by the president and two of the trustees. All of the trustees were present at the arbitration and took part in it, and most, if not all of them, were examined as witnesses.

Although the ordinary rule to bind a corporation requires that it should be done by a resolution of the board, yet there may be circumstances where submission to arbitrators, although at first informal, may be ratified by the parties.

In *Hays v. Hays* (28 Wend. 366) Judge Cowen says: "No matter what the form was under which the parties ostensibly proceeded, they were mutually assisting to and promoting the whole, with the obvious intent to settle their controversies. Their acts, of themselves, operated as a submission." *Dredwith v. Ruttily*, 2 Hill, 272.

A corporation may act in other ways than by a formal resolution. Their acts may in some instances be established by circumstances. In *Troy Turnpike Co. v. Chemey* (21 Wend. 296) verbal instructions from the directors to an agent, without any formal resolution, were held sufficient. The acts of the parties in consenting to the arbitration, and the attendance upon it of all the trustees and officers, I think, conclude the defendants upon the question whether they agreed to submit to it.

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The same rule is sanctioned by the Chancellor, in *The American Ins. Co. v. Oakley* (9 Paige, 501). The acts and agents of corporations, like those of individuals, when not reduced to writing, may be inferred from other facts and circumstances, without a violation of any known rule of evidence.

An objection is taken that the award is only signed by two of the arbitrators. By the statute (2 R. S. 542, § 7) it is provided that an award by a majority of the arbitrators shall be valid, unless the concurrence of all is expressly required in the submission.

The submission in this case expressly provides that the decision of a majority of arbitrators shall be binding on both parties.

The bond, it is true, speaks of an award by the arbitrators; but that is not material, as it must be construed as meaning an award made in pursuance of the submission.

The award is consistent with the submission, and the motion must be denied, with \$10 costs.

From the order denying the motion defendants appealed to the general term.

*Beebe, Dean and Donohue*, for the appellants.

*Patterson and McConnell*, for the respondent.

**DALY, J.**—It appears, by the affidavits, read on the part of the plaintiff, that, at a meeting of all the trustees, it was unanimously agreed that it would be better to arbitrate the matter in difference between the plaintiff and the society, and that the trustees then and there authorized the president of the society and two of the trustees to act for the society in the matter of the arbitration. This is denied by affidavits on the part of the defendants; but the uncontested fact, that the submission to arbitration, drawn up by Dr. Raphael, was read and translated to the parties to it, and that all the trustees were present at the arbitration and took part in it, was sufficient to show that the defendants had assented to the submission. The assent of a cor-

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poration may be inferred from circumstances. It is not necessary that there should be a formal resolution of the board of directors or trustees, on an agreement under seal, to charge them. *Troy Turnpike Company v. Cheney*, 21 Wend. 296. In *Farrill v. Railway Company* (2 Exch. 344) the consent of the attorney of a corporation, in an action of debt, to refer the matter to arbitration, was held to be a valid submission and binding upon the corporation, although the attorney deposed that he had no authority, under the seal of the company, to sign the consent, but was merely authorized verbally, by the chairman of the board of directors. Here, then, was something more than the authority of a presiding officer. The submission and all proceedings anterior to the award were sanctioned by the presence and participation of all the trustees. *Hays v. Hays*, 23 Wend. 366. Under these circumstances, the judge below was justified in believing the statement in the plaintiff's affidavit, that all the trustees at a meeting authorized the parties who signed the submission to arbitrate the matter, and that was enough.

It is objected that the award was signed by but two of the three arbitrators. The submission declares that the decision of the majority shall be binding, and the bond provides that the award is to be made in writing, subscribed by "the said arbitrators." The submission and bond are to be taken together; and, taken together, they show that the execution of the award by the majority of the arbitrators was within the meaning and intention of the parties. By statute (2 R. S. 542, § 7), an award by a majority is sufficient, unless the concurrence of all is expressly required in the submission, which was not the case here.

The next objection is, that the arbitrators sat, examined witnesses, and deliberated upon the matter, on Sunday. The parties and witnesses in this unpleasant controversy, which arose out of a claim of the plaintiff for baking the passover bread for this religious corporation, are all of the Jewish persuasion, and consequently observe the seventh day of the week as their Sabbath or day of rest. To them the Christian Sabbath is a secu-

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lar day, but its universal observance as a day of rest, by the great mass of their fellow citizens, renders it a day upon which people of this persuasion are compelled more or less to abstain from their ordinary pursuits, and upon which they are necessarily less employed. It is very natural, therefore, that they should select, for a matter of this kind, a day when, from keeping Saturday as a Sabbath, they are privileged to engage in any labor that does not disturb the rest of their fellow-citizens. The defendants having consented to settle by arbitration, at the instance of one of their prominent ministers, a controversy growing out of the wants or requirements of their religious rites, with the special view of preventing its becoming a matter of public litigation, and the parties and witnesses having attended voluntarily for that purpose, on a day evidently the most convenient to them, it would be very much to be regretted if the investigation of the matter on that day should render the subsequent award of the arbitrators of no avail, and, at the instance of those among the defendants who are dissatisfied with it, that the whole subject should be open for a public investigation in the courts.

Our statute prohibits servile laboring or working on Sunday, but the prohibition is declared not to be applicable to those who uniformly keep the last day of the week, called Saturday, as holy time, and do not labor or work on that day, provided their labor shall not disturb other persons in their observance of the first day of the week, as holy time. 1 Rev. Stat. 675, § 70. It was not unlawful, therefore, for the parties and witnesses here, being all Israelites, to assemble together on Sunday, and investigate, deliberate upon, and arbitrate the matter in controversy. Witnesses could not have been compelled to appear before the arbitrators, as subpoenas to enforce their attendance could neither be served nor executed on that day (1 Rev. Stat. 675, § 69), but the witnesses attended and submitted to an examination before the arbitrators voluntarily. That the witnesses were sworn by the arbitrators is immaterial, as it is not essential to the validity of an award, that the witnesses should have been sworn. *Bergh v. Pfieffer*, Lalor's Sup. to Hill & Denio's Rep. 110. It was held in *Story v.*

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*Elliott* (8 Cow. 27), that an award made and published by arbitrators on Sunday is void. In the present case, the arbitrators sat, heard the parties and witnesses, and signed the award on Sunday, but it was dated as of the next day, and was delivered to the parties on Monday. An award is said to be published when the parties are notified that it is ready for delivery. *Musselbrook v. Dunkin*, 9 Bing. 605; *McArthur v. Campbell*, 5 B. & Adolp. 518. The rule is more fully, and, I think, correctly stated in the recent work of Mr. Russell, on Arbitration (p. 617): "An award is ordinarily said to be published as soon as it has been executed by the arbitrator, and announced as his final determination, so that he no longer retains any power of alteration." Here, the award was dated as of Monday. On that day the arbitrators delivered it, and up to that time they had the right to alter it if they saw fit. *Eveleth v. Chase*, 17 Mass. 458; *Low v. Nolle*, 16 Ill. 475. It must, therefore, be regarded as having been made and published on Monday.

The case of *Story v. Elliott* would have been in point, if the arbitrators had published it on Sunday. In that case, the publication of an award was regarded as equivalent to the giving of judgment, which cannot be done on Sunday; but I find no case that would warrant us in concluding that the award is vitiated and made void, by what was done by the arbitrators upon the Sunday preceding its publication. As before remarked, it was unlawful for the arbitrators, being of the Jewish persuasion, to do what they did, on that day, in the investigation of the matter, and if their sitting and investigating it, preparatory to publishing their award, might be regarded as partaking of the nature of a judicial proceeding, which I very much doubt, still it would not render their subsequent award void. Sunday is not *dies juridicus* for the giving of judgment, or the awarding of judicial process, but it may be for other matters connected with judicial proceedings. 3 Thomas' Coke, 355, n. 3. Thus it was held in *Becloe v. Alpe* (W. Jones R. 156), that exhibiting an information on Sunday against the defendant, in the Court of Exchequer, for ingrossing butter, &c., contrary to a certain statute,

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was good, the court declaring that although Sunday was not *dies furidicus* for the award of any judicial process or to *make an entry* of any judgment, yet it was good for accepting an information upon a special statute. In *Taylor*'s case (12 Mod. 667), it was said that the service of a summons, in a real action, on Sunday was good, as it was not compulsory on the party to appear, and in *Walgrave v. Taylor* (1 Lord Ray. 705), the court held that the service of a declaration in trespass on Sunday was good, though in subsequent cases it appears to have been regarded as the service of process forbidden by the statute 29 Car. II, c. 7. *Morgan v. Johnson*, 1 H. B. 628; *Walker v. Fowne*, Barnes, 309; *Roberts v. Monkhouse*, 8 East, 547. In *Sayles v. Smith* (13 Wend. 57), it was held that the proceedings in a statute foreclosure of a mortgage were not void because the day of sale specified in the advertisement was Sunday. The sale was postponed to another day, but the court was of opinion that even if the sale had taken place on Sunday, it would not have rendered the proceedings void. In *True v. Plumley* (36 Main, 466), it was held that the verdict of a jury in a civil suit, though agreed to, signed and sealed up on a Sunday, might be recorded on the following day; and in *Houghtaling v. Osborne* (15 Johns. 119), and in *Hurdekooper v. Collin* (3 Watts, 56), it was held that a verdict of a jury in a civil suit might be received upon Sunday, though judgment could not be entered upon it until the day following; and in *Baxter v. People* (1 Gil. 368), which was a capital case, the court said that Sunday was not a day to render judgment, and if rendered on that day it would be void, but the verdict of the jury might be taken. The extent to which the adjudged cases appear to have gone, is, that nothing partaking of the nature of process in a civil action can be awarded, executed or made returnable, nor any proceeding entered or recorded in any court of justice as having been done, or as to be done, on that day. 2 Inst. 264; 3 Shep. Abr. 181; 5 Comyn Dig. 523, title *Tempa*, B. 3; *Swan v. Broome*, 3 Bur. 1595; 1 Wm. Black. 496; *Good title v. Notile*, 2 D. & Ry. 232; *Boynton v. Page*, 13 Wend. 425. In the present case, therefore, I think that the proceedings

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before the arbitrators, under the circumstances, would not invalidate their award, which purported upon upon its face to have been made, and was actually delivered and published on Monday. The order of the judge at special term should be affirmed.

Order affirmed.

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**GEORGE M. SHERMAN v. GEORGE ELDER, WILLIAM R. PAINTER and CHARLES F. LINEBACK.**

Where a husband has exclusive control of the separate estate of his wife, and of its accumulations, upon the faith of which it is just to infer he obtained credit, and which he possesses without restriction, exercising acts of ownership, and presenting to the world all the semblance of title with the permission and by the agreement of his wife, the property is liable to his creditors for his debts.

The law does not tolerate a contract between husband and wife, by which he becomes her servant, and she receives and retains the advantages and accumulations of his labora.

The acts of 1848 and 1849 confer upon a married woman the right to hold her separate estate free from her husband's debts and power to sell. But they do not relieve her personal estate from the doctrine of the common law when she invests her husband with full power to traffic with it, nor do they give her the right to traffic therewith, and to assume the liabilities and obligations of commercial enterprise.

APPEAL by plaintiff from a judgment entered on the report of a referee. The action was brought by the plaintiff, as assignee of Lucy Sherwood, to recover damages for the taking of personal property, claimed to be a part of her separate estate, and taken on execution against her husband Daniel Sherwood. The cause was tried before a referee, who reported for the plaintiff for a small part of his claim. Judgment was entered therein, but was reversed on appeal by the defendants, and a new trial was ordered, upon the ground that the complaint was defective, in neither alleging that the plaintiff had made a demand subsequent to the assignment to him, nor that Lucy Sherwood had assigned her claim for damages against the defendants. See report of the case, *ante*, page 178. The plaintiff then amended

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his complaint, alleging that Lucy Sherwood had assigned her claim for damages as well as the property itself to him. Upon the second trial, the referee dismissed the complaint. The plaintiff appealed. The facts are stated in the opinion of the court.

*Albert Mathews*, for the appellant.

*R. M. Harrington*, for the respondents.

BRADY, J.—The appellant presented, on the argument, a variety of questions, some of which, for the purposes of this appeal, it is unnecessary to consider. Upon the main facts in the case there cannot well be any dispute, and the findings of the referee are not in conflict with the evidence disclosed on the trial. The facts, substantially, are, that Mrs. Sherwood was engaged in the grocery business at the time of her marriage with Daniel Sherwood, which took place on the 12th of January, 1850. That at the time of the marriage Daniel was not engaged in any business; and the first business in which he engaged after that event was attending the grocery store of his wife. By the arrangement made between himself and wife, he was to carry on the business and have enough out of it to live on for his services. He attended the store and bought all the goods, and bought for the store the goods for the amount of which he confessed a judgment to Elder & Painter. He was in the habit of giving notes for purchases made for the store, which were signed in the name of "L. Sherwood." The business was entrusted in his hands without any special instructions or directions. He consulted his wife in some instances, and in some he did not, in giving notes, but did not in the payment of them. He never told Elder & Painter he was doing business in his wife's name, but was under the impression they so understood it, although they told him that they did not so understand it. He paid the rent of the store, and took a receipt in his own name. The purchases made by him, and the improvements made upon the premises occupied by him and his wife, were so made out of the proceeds of the business,

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which he conducted in the manner stated. There is no proof that after the marriage Lucy Sherwood gave any personal attention to the business, while the facts just detailed show that it was exclusively managed by her husband Daniel. Prior to the acts of 1848 and 1849, the personal property of the wife *dum sola* became that of the husband the instant it passed into his possession, and was subject to the payment of his debts. Those acts destroyed that rule of the common law, by providing that it should neither be subject to his disposal nor his debts, but should continue her sole and separate property, as if she were a single female; but whether it conferred upon her the right to use it in all respects as if she were a *feme sole*, has not yet been decided. If she can, then, in reference to her separate estate, she has a separate legal identity, and, as an incident, the right to make contracts in relation thereto, wholly untrammelled by her marital relation. It is not necessary, however, in this action, to determine that question. Whatever she might have power to do with a stranger, when her dealings are with her husband the law will look upon them with distrust if the effect will tend to render the use of her separate estate a means of fraud.

In this case, it appears that the husband had exclusive control of the separate estate and its accumulation, upon the faith of which it is just to infer he obtained credit. He possessed it without restriction, exercising acts of ownership, and presenting to the world all the semblance of title. This he did, not only with the permission of his wife, but by agreement with her. If she had labored with him, there is little doubt that the result of that labor, if it could be separated from the bulk of her estate, would be subject to the husband's debts; and I see no reason why the proceeds of the husband's labor should not be exposed to a similar rule. I am not aware that the law has yet tolerated a contract between husband and wife, by which he may become her servant; and I suppose it to be quite unquestionable, that for services so rendered he could not recover, and that for such a contract, broken by the husband, she could not recover damages from him. Nor do I believe that the legislature ever intended

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that the wife should exercise any higher prerogative, in reference to her separate personal estate, than to hold it as if she were a *feme sole*, free from her husband's debts, and power to sell. They did not intend to relieve her personal estate from the doctrine of the common law when she invested her husband with full power to traffic with it even in her name. The statutes referred to are in derogation of the common law, and should not be enlarged by construction, especially in cases of doubtful expediency. They do not grant the right to a married woman to traffic with her personal estate, assuming and contracting all the liabilities and obligations of commercial enterprise. That power, if it is to exist, should be established by express enactment, as well as the right to employ the husband as agent to conduct the business for her, and thus advise the community that her separate estate is held aloof from the creditors of her husband, although he has, ostensibly, exclusive charge thereof, and of the business predicated thereon. At present the law does not authorize such transactions, and Mrs. Sherwood must be regarded as having devoted or dedicated to her husband the stock of groceries which she had when he took charge of her business, and the accumulations or changes thereto. And this applies to the articles mentioned in the finding of the referee, which were valued by him at sixty dollars; and which were portions of the old stock, or things bought during the first marriage of Mrs. Sherwood. The plaintiff, therefore, acquired nothing by the assignment.

The judgment of the referee was right, and should be affirmed.  
Judgment affirmed.

## JOSEPH E. ISAACS v. WALTER GORHAM.

I loaned to G. \$1,000, taking, to secure the repayment thereof, his note therefor, and eleven receipts, signed by G.'s wife, for eleven consecutive monthly payments of £15 each, payable to her by J. G. K. & Sons, in monthly installments, out of

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money's constituting a part of her separate estate. Before the first of these payments became due, G. forbade J. G. K. & Sons to pay the amounts to I., and thereafter drew them out as they became due, himself.

*Held*, that in an action by I., to recover the \$1,000 from G., the latter could not be arrested.

I. He had not removed or disposed of his property with intent to defraud his creditors. The money's thus drawn out by him were not his property. His creditors had no claim thereon, nor could they be applied to the payment of his debts. They were the separate property of his wife, and the fact, that the defendant drew them from the banker authorized to pay them on her receipt, could not, in any aspect, be regarded as a fraudulent removal or disposition of *his* property.

II. Nor did the defendant's withdrawal of the money, intended as a security for the repayment of the loan, show that the debt was fraudulently contracted. The receipts given by the wife, she had the power to countermand. The husband had no authority to bind the wife by his agreement, and the plaintiff could not ~~prove~~ that he had been defrauded by relying upon such an agreement.

**APPEAL** by plaintiff from an order discharging the defendant from arrest. This action was brought to recover \$1,000, money borrowed. At the time of the loan, the wife of the defendant, whose maiden name was Josephine Wilson, was receiving from England, through the hands of James G. King & Sons, monthly payments of £15 each. The defendant, learning that a bequest of £3,000 had been left her by a relative in England, borrowed the amount in suit from the plaintiff for the purpose of going there and making arrangements to procure the bequest. As security for the repayment of the loan, he gave a promissory note for the amount, \$1,000, payable in three months, signed by himself and wife, and eleven receipts in the following form:

“ £15.

Date.

“ Received, of James G. King & Sons, through Walter Gorham, proceeds of fifteen pounds sterling, placed at my disposal by Sir Sam'l Scott & Co., as per letter of \_\_\_\_\_

‘JOSEPHINE WILSON.

“ Pay to the order of Joseph E. Isaacs.

“ WALTER GORHAM.”

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These receipts were given, one for each month for eleven months, the only difference being in their date.

The defendant was unsuccessful in his journey to England, and on his return directed James G. King & Sons not to make the monthly payments to the plaintiff under these receipts, but proceeded to draw them out as they fell due. The affidavits were contradictory upon the question, whether or not the plaintiff consented to his doing so. The defendant having been arrested in this action, brought to recover the \$1,000 from him moved to be discharged from arrest. The motion was granted, and the plaintiff appealed.

*H. Morrison*, for the appellant, contended,

I. That the defendant was guilty of a fraud in contracting the debt or obligation for which the action was brought.

II. That he had disposed of his property with intent to defraud his creditors, and cited the following authorities: *Van Wyck v. Seward*, 18 Wend. 375, *per Bronson, J.*, p. 395; *Letz v. Ely*, 3 Abbott's Pr. R. 478; *Chitty on Con.* p. 622, note n, and cases therin cited; *Crandall v. Byan*, 5 Abbott's Pr. R. 163; *Brady v. Bissell*, 1 ibid. 76.

*G. T. Jenks*, for the respondent.

**DALY, J.**—There was nothing to show a removal or disposition of property to defraud creditors. The fund in the hands of James G. King & Sons belonged to the defendant's wife. The defendant's wife signed several receipts for subsequently occurring payments out of this fund, and by an order of the defendant attached to each receipt, the payments were made payable to the plaintiff, and the receipts, with the orders of the defendant underwritten, were delivered to the plaintiff. The defendant, in violation of this agreement and understanding—that the payments might be made to the plaintiff—drew them from the bankers as they fell due. But the money thus drawn was not his property. This creditor had no claim upon it. It could not

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have been applied to the payment of his debt. If a judgment had been recovered, and he was brought before a judge upon proceedings supplementary to execution, the judge could not order James G. King & Sons to make these payments to the plaintiff until his debt was satisfied, nor, if the defendant had the money in possession, could the judge direct the defendant to pay it to the plaintiff. It was the separate property of the wife, and the fact that the defendant drew it from the bankers, authorized to pay it on her receipt, could not, in any aspect, be regarded as a fraudulent removal or disposition of his property.

The withdrawing of the money, which was designed by the defendant to be a security for the repayment of the thousand dollars loaned to the defendant by the plaintiff, would not show that the debt was fraudulently contracted. The giving of receipts for accruing payments signed by the wife, with the defendant's order, making them payable to the plaintiff, was no agreement on the part of the wife that these payments might be made to the plaintiff. If the plaintiff saw fit to loan money upon such a security, it was his own folly. He should have had something which neither the wife nor husband could countermand. The wife simply acknowledged that she had received the payments from the bankers through the defendant. She gave a receipt to the defendant which would authorize him to receive the payments from James G. King & Sons, but which did not authorize him to transfer them, by way of security or otherwise, to the plaintiff. Upon the production of that receipt the bankers were authorized to pay the amount acknowledged by the receipt to the defendant, but not to his order. The bankers might probably have been protected if they had paid the money to the plaintiff upon the production of the receipt, but they would not have been if notified by the wife not to pay it to him. The husband had no authority to bind the wife by the agreement he made with the plaintiff, and the plaintiff cannot allege that he was defrauded by relying upon an agreement which constituted no security at all, which the wife could repudiate at any moment, and which it appears she did, as the

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defendant swears that the money was drawn by him at her request, for the purpose of obtaining the means of subsistence for her and himself.

Order appealed from affirmed.

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**JONAS N. PHILLIPS v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK.**

The provision of the amended charter of the city of New York, passed April 14<sup>th</sup> 1857, that "no member of the common council shall receive any compensation for his services as such member," applies to members elected before the passage of that act, and deprives them of compensation for all services rendered after the act took effect.

The act is not unconstitutional.

- I. It is neither a private nor local bill, and does not come within the provision of the constitution, that no such bill shall embrace more than one subject, and which shall be expressed in the title. Art. 3, § 16. A statute cannot be termed local or private which provides for the government of a considerable portion of the territory and population of the state, delegating powers of legislation, and authorizing the passage of laws, as well as the administration of them, which, in their operation, affect all the citizens of the state, who, either in their persons, come within the range, or whose property is within the limits, of that jurisdiction.
- II. Nor can the provisions of the amended charter be said to be of more than one subject. The section prohibiting aldermen from acting as judges of the Courts of Oyer and Terminer and Sessions, is proper and consistent with the other provisions of the act, and a necessary part of the new system thereby created.
- III. The section providing a punishment for bribery offered to or committed by an officer of the city is not a subject separate from or unconnected with the other provisions of the charter, within the meaning of the constitution.
- IV. If there were any doubt upon these points, it would not be necessary to declare the whole act void. So much as is consistent with the title would be sustained, and the remainder only invalidated.
- V. Nor is it any objection to the constitutionality of the charter, that by the 44th section it takes away the compensation of an officer during his term of office. There is no doubt of the power of the legislature to do this.

The 54th section of the charter, providing that no right accrued before the act took effect should be prejudiced thereby, does not apply to prospective compensation of public officers, not then earned.

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CASE submitted without controversy on an agreed statement of facts, under section 372 of the Code. The facts were substantially as follows: Jonas N. Phillips and Jesse Mitchell were, in November, 1856, elected councilmen, the one from the seventeenth and the other from the forty-third council district. They qualified as required by law, and entered upon the discharge of their duties. By the charter then in force, councilmen received four dollars for each day in which they sat in the common council. In April, 1857, and while Phillips and Mitchell were still in the common council, an act amending the city charter was passed. This amended charter provided (§ 44) that "no member of the common council shall receive compensation for his services as such member." This act took effect the 1st of May, 1857. Jonas N. Phillips and Jesse Mitchell remained in the common council; and they claimed compensation for eight days' attendance thereon, subsequent to the 1st of May, for which the city refused to pay. Mr. Mitchell assigned his claim to Jonas N. Phillips. The questions submitted to the court were as follows:

*First.* Whether the act of April 14th, 1857, is not void, as being in violation of the constitution of the state of New York?

*Second.* Whether it is not unconstitutional in so far as it seeks to take away (if it does so) the compensation of councilmen elected under the law of April 12th, 1853 (amended and confirmed by the act of June 14th, 1853), and in office at the time it went into operation.

*Third.* Whether, even if constitutional, it affects any others than the councilmen whose election is provided for under it, or extends to or was meant to embrace councilmen in office at the time it went into operation?

*Fourth.* Whether the said Jonas N. Phillips is not entitled to recover, by virtue of the act of April 12th, 1853 (amended and confirmed by the act of June 14th, 1853), the amount claimed, viz., sixty-four dollars.

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*John Graham*, for the plaintiff. I. The act of April 14th, 1857, is a local bill and embraces more than one subject, which is not correctly expressed in its title, and is, therefore, unconstitutional. Cons. Art. 3, § 16.

Section 48 of the act not only excludes the aldermen from acting as judges of the Court of Oyer and Terminer, or in the courts of General or Special Sessions in the city of New York, but it provides who may hold these courts. Courts of Oyer and Terminer are constitutional courts (Const. Art. 6, § 6), and the designation of judges by whom they are to be held, or any amendment to or alteration of their jurisdiction, does not come within the range of amendments to the city charter. To amend or change the jurisdiction of a constitutional or state court, does not belong to an amendment of the charter of the city of New York. For the proper construction of this provision of the constitution, see *In the matter of Walker*, 3 Barb. S. C. R. 162; *Connor v. The Mayor, &c. of N. Y.*, 1 Seld. 285; *The Sun Mut. Ins. Co. v. The Mayor, &c., of N. Y.*, *ibid.* 241.

Section 52 of the act adds two new crimes to the criminal catalogue of this state. *First*, it makes it criminal to offer a bribe to an officer of the city government; *second*, it makes it criminal for the officer to receive it. Such a law should not form part of a city charter. The true test, as to whether this act is multifarious, is this: would an inspection of its title naturally lead to the conclusion that such provisions as these formed a part of it? *For the title by the constitution is intended to be an index to the whole law.* See cases *supra*.

II. If the intention of the act in question was really to take away all compensation for their services from the present councilmen—and such is its effect—it is unconstitutional on that ground. Councilmen are officers, under the charter, of this city. Laws of 1853, pp. 410, 738. The principles regulating the right of the legislature to interfere with the compensation of such officers, and state officers, are entirely different. As to the former, the compensation must remain intact until the expiration of the term of the existing incumbent. As to the latter,

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although their emoluments may be varied, they cannot, during their terms, be entirely abolished. *Connor v. The Mayor, &c. of N. Y.*, 1 Sandf. S. C. R. 355; S. C., 1 Seld. 285.

III. Even if the act would not be unconstitutional, for taking away the compensation of existing councilmen, unless the court can see that it was the plain intention of the legislature, and that it is the indubitable meaning of the language of the act, it should not favor such a construction. 1st. The common council spoken of in section 44 is the common council provided for by the act, which enacts (§ 51) that the mayor, aldermen and councilmen provided for in this act shall be elected on the first Tuesday of December, 1857. 2d. Section 54 declares that "this act shall not prejudice or affect any right accrued or proceeding commenced before this act takes effect." The right of the existing councilmen to their compensation for a whole year is a "right accrued," within the meaning of this provision.

*Richard Busteed*, for the defendants.

INGRAHAM, FIRST JUDGE.—The parties hereto have agreed upon a case containing the facts, which they submit to the court, pursuant to the provisions of the Code, for judgment thereon.

The plaintiff claims to recover against the defendants for compensation as a councilman for eight days, in May, 1857, and for the same services rendered by Jesse Mitchell during the same month—the latter claim having been duly assigned to the plaintiff.

The defendants refuse payment of these claims, upon the ground that the provisions of the amended charter of April, 1857, deprive the members of the common council of any compensation for such services after the same took effect.

By the acts of April 12, 1853, and June 14, 1853, councilmen were substituted in the place of assistant-aldermen, formed a part of the common council of the said city, and were entitled to the same compensation as the aldermen.

The case admits that compensation to have been duly fixed a

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four dollars for each day the alderman should sit in the common council.

The question then arises, whether the amended charter of 1857 deprives the members of the present common council of such compensation.

By section 44 of this charter it is provided that "no member of the common council shall receive any compensation for his services as such member." Laws of 1857, ch. 446.

If this provision is applicable to the members in office at the time of its passage, there is no authority for the payment of compensation to the members of the common council.

The previous part of section 44 refers to officers under this charter, and the defendants' counsel contends that the whole section must be construed as relating to such officers.

By the 51st section of the same act it is enacted that the mayor, aldermen, and councilmen, provided for in this act, are to be elected at the first election for charter officers to be held after its passage.

I have had occasion heretofore to pass upon the provisions of this statute in the matter of Devlin, so far as the same was applicable to the present common council, and have held that the powers therein granted were conferred upon the present members of that body, so far as they were required for the purposes of government, to prevent an entire cessation of the powers of legislation during the year. If this construction of the charter be correct, then it necessarily follows that the provisions of the 44th section also apply to the present members. Many of the provisions of this act have already been acted upon by the common council, and the departments are now organized under those provisions.

If the term "common council" is confined to those hereafter to be elected, then no ordinances for the organization of the departments would be passed, except by those who may be elected under this charter; and if the act does not apply to those now in office, there is no law excluding the present aldermen from the courts of Oyer and Terminer and Sessions, as provided in the

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48th section, because the law heretofore passed on that subject is repealed by that act.

The common council itself can only exist under this charter. All its powers must depend on the present statute, because, without organization under it, there is no law which recognizes such officers as councilmen; and when the statute provides, in general terms, that no member of the common council shall receive any compensation for his services as such member, I see no way of avoiding the conclusion, that the same refers to the present as well as the future members. The former part of the section is not entirely confined to future legislation. It provides for the disposition of fees now or hereafter to be provided, and whenever the statute is intended to apply to officers thereafter to be chosen or appointed, it is express in limiting its operation to "officers under the charter," or "provided for by the act."

It is said that the act allowing such compensation to the members of the common council is not repealed. The provision of the 44th section, if applicable to the present members, would be a repeal of that statute, even if no express repeal was contained in the act; but, by the 54th section, all laws inconsistent with the act are thereby repealed, and if the provision above referred to applies, then the statute would be inconsistent with the new charter, and would be expressly repealed thereby.

The 55th section of the act, which provides that it shall take effect on the 1st of May then ensuing, also shows that the legislature intended that its provisions should be operative in some parts at that time.

It is contended also, on the part of the plaintiff, that the amended charter of 1857 is a local bill and embraces more than one subject, which is not expressed in its title, and is therefore unconstitutional.

The provision of the constitution is, that no private or local bill shall embrace more than one subject, and that shall be expressed in the title. Art. 3, § 16.

I am not prepared to admit that the act in question is either a private or a local bill. It can in no sense be called a private

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bill. It is intended to regulate the government of a city containing a large portion of the population of the state, authorizing the city authorities to exercise powers of legislation, which, without it, would belong to the legislature. A private act is one of an entirely different character, relating to private and not public interests, and to individual cases, and not to a whole community.

Nor do I think such an act, devolving upon others the powers which the legislature possesses for the purposes of government, can be called a local act. In the case of *Connor v. The Mayor, &c.* (1 Selden, 285), an act was under consideration providing for the salaries of certain officers elected in the city of New York, to which the same objection was made as in the present case. Judge Foot, in his opinion, referring to this objection, says, "In my opinion, the act is neither private nor local."

And again, he says, "Regulating the amount and manner of paying the officers, or a given number of the officers of a county of this state, for their official services, when such services are rendered in and form part of the administration and execution of the laws of this state, and affect the citizens thereof who come within their range, can neither be private nor local in the view contemplated by the constitution."

With much greater force may these remarks be applied to a statute providing for the government of a large portion of the territory and population of the state, delegating powers of legislation and authorizing the passage of laws as well as the administration of them, which in their operation affect all the citizens of the state, who either in their persons come within their range or whose property is within the limits of that jurisdiction.

Nor do I think the provisions of the statute can be said to be of more than one subject. The act was intended to provide or add to the charter of the city. The previous charters had conferred on the aldermen the right to sit as judges of the Oyer and Terminer and of the Sessions. In framing the new charter, as well as in the act to amend the charter of 1849, passed 12th of April, 1853, it was deemed advisable to prohibit the aldermen from any longer exercising that power, and it was proper and

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consistent with the other provisions of that act, and a necessary part of the new system contemplated thereby, to prohibit those who formed a portion of the city government from exercising any longer such powers. The further provision, that the remaining judge in those courts should hold the same without the aldermen, was only necessary as declaring what would follow from the prohibition.

If, however, there was any doubt upon this question, it is not necessary to declare the whole act void. So much of it as is consistent with the title could be sustained. Such was the decision of the Supreme Court of the second district in *The Town of Fishkill v. The Plank Road Company* (22 Barb. S. C. Rep. 634), in which the first section of a statute was held to be valid, and the residue to be void, on account of the defect in the title.

It was also urged that the provisions of the fifty-second section brought the statute within the constitutional objection. That section provided a punishment for bribery offered to or committed by an officer of the city government. It was necessarily connected with the city charter, to preserve the purity and integrity of its members or officers, and should not, in my judgment, be considered as a subject separate from, or unconnected with a city government.

It can hardly be necessary to discuss the question, whether the legislature can take away the compensation of an officer during his term. In *Warner v. The People* (2 Denio Rep. 272), Judge Bronson says, "I do not doubt that the legislature may regulate and reduce or take away the fees of the officer." And, in *Connor v. The City of N. Y.* (2 Sandf. 355), such right to alter or take away the compensation of a public officer is maintained.

The plaintiff also claims that the fifty-fourth section of the amended charter declares, that no right, accrued before the act took effect, should be prejudiced thereby. This did not apply to prospective compensation not then earned. So far as the plaintiff had rendered service, so far his right to compensation had accrued, but no such right can be claimed before the service was rendered.

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The cases above referred to show that the right to perform such service may be taken away, and it must of course follow that there was no accrued right in the plaintiff by which he could insist on pay for discharging his duties, contrary to the provisions of the statute.

Judgment for the defendants.

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#### ISAAC MAYER v. CHRISTOPHER MOLLER.

In an action for rent upon a written contract to hire, signed by the tenant only, it is to be presumed, in the absence of evidence to the contrary, that the landlord's agreement to let was also in writing.

In such an action, evidence of a parol agreement, on the part of the landlord, to repair, is inadmissible, except it is preceded by proof that the landlord's agreement to let rested in parol.

In a contract of letting, there is no implied warranty that the premises are tenantable.

APPEAL by plaintiff from a judgment of the Sixth District Court. This was an action for rent. The defendant, by an agreement in writing, hired the premises No. 156 West 35th street, for sixteen months from the first of January, 1856. The agreement introduced by the plaintiff was signed by the defendant—the tenant—only. There was no evidence offered upon the trial, as to whether the plaintiff had given a written lease to the defendant or not. But the defendant proved, subject to the objection of the plaintiff's counsel, that the plaintiff had, prior to the defendant's taking possession of the premises, promised the defendant that he would put the house in good repair, and, in particular, repair a leak in the roof, which he subsequently refused to do, and by reason of which the house was rendered untenantable. Judgment having been given for the defendant, the plaintiff appealed.

*E. B. Shafter*, for the appellant.

*C. Moller*, respondent, in person.

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BRADY, J.—The defendant hired the premises from the plaintiff, and executed an agreement of hiring. No promise or agreement, on the part of the plaintiff, to repair, is contained in that paper writing, and, in the absence of proof that the landlord's agreement was by parol, the presumption is that it was also in writing. The fact was susceptible of proof very readily, and the defendant should have proved it. It may be regarded as suspicious, that no attempt or offer was made thereto by the defendant. If it had clearly appeared that the letting rested in parol, the defendant might have introduced proof to show a promise to repair at the time of the letting. *Cleves v. Willoughby*, 7 Hill, 85. Omitting to make that clear, the presumptions are against such a fact. Regarding the landlord's engagement, therefore, as in writing, the evidence of the conversation that took place before the defendant took possession was improperly received. The plaintiff was not bound to keep the premises in repair, and there was no implied warranty that the premises were tenantable. 7 Hill, *supra*, 86; *Post v. Vetter*, 2 E. D. Smith, 248.

Judgment reversed.

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#### HANNAH E. GILMAN v. ISAAC REDDINGTON and others.

A devise to executors in trust, to use the devised fund in the education, support and maintenance of the testator's three children, or of such of them as may survive, or of the issue of any that may die, until the two youngest or the survivor attain the age of thirty years, is valid. The limitation is in fact for two lives only, *viz.*: those of the two youngest children.

The power to accumulate the fund beyond the minority of the testator's two youngest children, conferred by such a devise, is void; but it does not invalidate the bequest or the trust estate created thereby. That continues in the trustees until the two youngest children, or the survivor of them, attain the age of thirty. So far as the right to hold and manage the estate is concerned, it is valid.

APPEAL from a judgment of the special term. This was an

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action brought to procure an adjudication upon a will, and to obtain a decree declaring certain parts of it to be void. The will in question was that of Nathan Gilman, Jr. It contained, among other bequests, the following clause, which the plaintiff, the widow of the deceased, sought in this action to have declared void :

*"Item. All the rest, residue and remainder of my estate, both real, personal, and mixed, I give and devise to my executors, hereinafter named, the survivors or survivor, in trust to manage the same, and to apply so much of the same, or the income thereof, as they may see fit, in the exercise of a sound discretion, in the education and maintenance of my three children, Willis Porter Gilman, Charlotte Elizabeth Gilman, and Nathaniel Gilman, or to such of them as may survive, or to the issue of any that may die, until my two youngest children, Charlotte Elizabeth Gilman and Nathaniel Gilman, or the survivor of them, shall attain the age of thirty years, or until they both be dead, if they die before attaining thirty years of age; at which time my estate, so left in trust, is to be paid, conveyed or made over to such of my three children aforesaid as may then survive, or to the issue of any of them that may be dead, having issue then living, in equal proportions, so that the issue may have the share of the parent. But if all the children be then dead without issue then living, it is my will that said rest, residue and remainder, as aforesaid, of my estate, be paid or made over as follows: one quarter to my widow, if she then be living, and the balance to my brothers and sisters then living, or the issue of any that may be dead (the issue representing the parent), in equal proportions. If my widow then be dead, the whole is to be paid or made over as last aforesaid."*

Then followed a clause appointing the executors the guardians of the testator's children, to take care of their property, invest it in such stocks and securities as they might think best, and authorizing them to invest an amount, not exceeding one half, in good, productive real estate.

The cause was tried at special term, without a jury, before

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Judge Ingraham, and the following opinion was rendered by him :

INGRAHAM, FIRST JUDGE.—My conclusions, in regard to the questions submitted on the trial of this case, are, that the 5th article of the will, although it contains some provisions which cannot be sustained, is not entirely void. The devise to the executors is good, for the purpose of applying the income to the support and education of the children of the testator during their minority.

The limitation is in fact only for two lives, viz.: the two youngest children. It cannot be extended beyond their minority, and, on the death of those two children or their arriving at age, the trust ceases, and the estate must then be divided among the persons then entitled to receive it. Any other provisions, which may have the effect of continuing the trust for a longer period, must be declared void. There is not, in these provisions, anything which, although void in themselves, renders it necessary to declare the whole of the 5th article to be void. The portion of it limiting the estate for the lives of the two children until they arrived at age, or die, may be sustained, and the intent of the testator so far carried out.

The residue of the sums of \$5,000 and \$20,000, after the termination of the life estate of the widow, fall into the portion of the estate disposed of by the 5th article, and are subject to the same disposition as the residue of the general estate.

The necessary provisions to carry out these views will be settled in the judgment.

From the judgment entered, in accordance with this opinion, the plaintiff appealed.

*Martin & Smiths and Charles O'Conor*, for the appellants.

FIRST POINT. The testator attempted, by the residuary clause, to create a special discretionary trust for the benefit of minors, adults and unborn generations, to endure for nearly thirty

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years, unless accidentally terminated at an earlier period by the death of his two younger children.

SECOND POINT. This trust contemplates many things which are expressly forbidden by law, and it is consequently incapable of being executed.

I. The life interests given to persons not in being are void. 1 R. S., 723, § 17-21 (see 4th ed. p. 183); *ibid.* p. 773, §§ 1, 2 (see 4th ed. p. 183).

II. This is not a case of successive life estates, where effect might be given to the testator's intent, by cutting off the life estates subsequent to the two first, because:

1. There are no two persons named to take in succession.
2. It would involve a manifest overthrow of the testator's whole design, and might leave his children penniless.

III. The power to accumulate is void, because not directed for the exclusive benefit of the minors in being. 1 R. S., 773, §§ 3, 4; *Harris v. Clark*, 3 Seld. 242.

IV. The powers to buy and sell or convey real estate are void.

THIRD POINT.—These provisions, which are manifestly and wholly illegal and void, enter so essentially into the general plan of the will, that even if it were practicable to separate them from the few directions which, if standing alone, and materially modified by the court, might be valid, it would still be impossible to carry such latter direction into effect, in any measure or degree, *without defeating the main object and most cherished wishes of the testator*.

I. This was to keep together the bulk of his estate, and to make it accumulate for a long period of time, affording meanwhile a sustenance to all his posterity who might be in need—children, grandchildren and great-grandchildren—was, evidently, the great object of the testator.

II. The several illegal trusts, trust powers and life estates were the indispensable and necessary means to the accomplishment of this object, and their failure is *destructive of the whole scheme of the will*.

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III. The court has no power to make a new will for the testator, but such would be the effect of attempting to carry out any one direction contained in the will. There is only one thing which could possibly be done under the trusts, which would not be illegal, and would, at the same time, approximate to an execution of a part of the testator's object, *i. e.*, the application of the whole income, *whether needed or not*, to the support and maintenance of such of the children as might happen to be in life. This would be *in violation of the expressed desire of the testator, for it would defeat the accumulation he aimed at, set aside the discretionary supervision he created*, and disappoint the remainder-men to whom he ultimately gave the estate.

IV. One of the monstrous and unnatural effects of such a direction would be, that for many years grandchildren of the testator might be starving, or in an alms-house, whilst a single surviving child had a superabundance.

FOURTH POINT.—The whole devise and bequest in trust, and all the trusts and powers connected therewith, being essential parts of one general scheme for illegally keeping together and accumulating the testator's property, and giving unauthorized remainders, should be declared to be illegal, inoperative and void; to the end that the just, reasonable and convenient appropriation made by the law of descents and distributions should take place. *Costar v. Lorillard*, 14 Wend. 265; *Hawley v. James*, 16 ibid. 61, 144; *Hone's Ex'rs v. Van Schaick*, 7 Paige, 230; 20 Wend. 564; *Thompson v. Carmichael's Ex'rs*, 1 Sand. Ch. R. 387; *McSorley v. McSorley's Ex'rs*, 4 ibid. 414; *McSorley v. Wilson*, ibid. 515; *Field v. Field's Ex'rs*, ibid. 528.

*P. G. Clark*, for the respondents.

I. The trust created by the 5th clause of the will is, in all respects, valid, with the qualification hereafter mentioned.

1. The estate is given to the executors to hold and manage the same until or during the life of the two children, or until they attain the age of thirty years.

2. The limitation cannot extend beyond the two lives in

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being, and may sooner terminate if the children live to the age of thirty.

3. This is a valid limitation. 2 R. S. (4th ed.) page 133, § 15; (1st ed.) page 723; *ibid.* (4th ed.) page 183, § 1; (1st ed.) page 773; *De Kay v. Irving*, 5 Denio, 646-650.

4. The direction for the accumulation beyond the minority of the infants is void, but the statute declares that such direction shall be void only as respects the time beyond such minority. See 2 R. S. (4th ed.) page 184, § 4; (1st ed.) 774; *De Kay v. Irving*, 5 Denio Rep. 646-53.

II. There is no provision of this will, which, if void, is so to such an extent, or is so connected with the other provisions, as to render the whole will void. *Haxton v. Corse*, 2 Barbour Ch. Rep. 506; *De Kay v. Irving*, 5 Denio, 646; *Parks v. Parks*, 9 Paige Rep. 117; *Darling v. Rogers*, 22 Wendell, 483; *Dupre v. Thompson*, 4 Barbour Sup. C. Rep. 279; *Van Vechten v. Van Vechten*, 8 Paige, 128.

The only provision subject to criticism is that in which the trustees are, during the time limited, to apply the income of the estate to the issue of any of the children who may die leaving issue. If the court shall think this direction void, still, the authorities cited are in point, that the other provisions may stand.

The court erred, however, in declaring that the trust wholly ceased upon the two children attaining the age of twenty-one years, and in this respect the decree appealed from should be modified.

The statute declares the *accumulation* shall cease at the termination of the minority of the children. The trust is valid, so far as holding and managing the estate is concerned during the two lives, or until the children named attain the age of thirty years, if they live so long, but the accumulation will cease. That is, the whole income must be paid over to the persons entitled after majority, but the principal will remain in the hands of the trustees during the time limited.

DALY, J.—I concur in the judgment pronounced at the special  
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term, except as far as it declares that the trust estate shall cease when the two youngest children, or the survivor of them, arrive at the age of twenty-one years. The power given to accumulate beyond the minority of the testator's children was void, but the estate in the trustees continues until the two youngest children, or the survivor of them, attain the age of thirty years. So far as holding and managing the estate during the two lives, or until the two youngest children reach the age of thirty years, if they live so long, it is a valid trust and may be executed. With this modification, therefore, I think the judgment of the special term should be affirmed.

Judgment accordingly.



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**ANDREW S. GARR v. HENRI MAIRET and C. A. ROBERT.**

**Costs**, as taxed or adjusted by the clerk, are not, under the Code, the measure of compensation for the services of the attorney, in an action between himself and his client to recover therefor.

In such an action, proof of the value of the service is required.

**APPEAL** by defendants from a judgment entered upon the report of a referee. The facts sufficiently appear in the opinion of the court.

*F. R. Coudert*, for the appellants.

*A. S. Garr*, respondent, in person.

**BRADY, J.**—The plaintiff, who is an attorney and counsellor of the court, sued the defendants to recover for services rendered in his professional character. Before the referee, no proof of the value of the services rendered was given, except the judgment rolls, showing the costs taxed against the parties sued by the defendants. Prior to the Code, there is no doubt the rule was, that the amount of costs taxed was the measure of compensation to

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the attorney, as between him and his client (*McFarland v. Crary*, 8 Cowen, 253; *Brady v. City of New York*, 1 Sand. 583, 584); but, by the Code, the rule was changed, leaving the attorney and client to make their agreement as to compensation. On authority, although perhaps the rule referred to is a fair one and should still prevail where no express agreement has been made, costs are no longer the measure of compensation, and proof of value of the service is required. Code, 303; *Easton v. Smith*, 1 E. D. Smith, 318; *Slow v. Hamlin and others*, 11 How. 452; *Moore v. Westervelt*, 3 Sandf. 762. The referee erred, therefore, and the judgment should be set aside and the cause referred back. Costs to abide event.

Ordered accordingly.

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**CAROLINE NORDEMEYER v. PHILIP A. LOESCHER.**

A common carrier has the right to exact payment in advance for his services, and if the person who employs the carrier pays the carriage in advance, he cannot be required to pay it over again to another party, who has, without his authority, performed the service. In such case, there is no privity of contract between him and the carrier who performs the service, and the latter has no lien upon the property against the owner, but must look to the party who employed him, for his compensation.

But a carrier, employed to forward goods, may employ another carrier to perform the service, and the latter will have a lien on the goods for his charges, where the charges for carriage have not been previously paid to the former carrier.

An agreement to carry a passenger and his baggage includes only ordinary baggage, or such articles of necessity and personal convenience as are usually carried by passengers.

H. agreed to convey N. from Hamburg to New York, and to forward her baggage to her there, to the care of the defendants. He employed another carrier to forward the baggage, from whom it was received by the defendant. It did not appear whether N. had paid for her passage or the carriage of her baggage or not:

Held, that, in the absence of such evidence, the defendant had a lien on the baggage for charges incurred in the carriage thereof, and paid by him to the carrier.

**APPEAL by defendant from a judgment of the Marine Court.**

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This was an action to recover damages for an alleged conversion of personal property of the plaintiff. Judgment was rendered for \$127 for the plaintiff, by the justice who tried the cause, which was affirmed at the general term of the Marine Court. The defendant appealed. The facts are stated in the opinion of the court.

*Charles A. May, for the appellant.*

*H. W. Johnson, for the respondent.*

DALY, J.—All that can be gathered from the very imperfect statement of the case, upon which this cause was heard by the general term of the court below, is, that the plaintiff made an agreement with one Hirschman, a shipping merchant in Hamburg, by which Hirschman promised to send her to New York in the ship Waterloo, and to forward her baggage there, which he told her she would find in New York, at the defendant's. It does not appear, by the case, whether she paid her passage or only paid part of it, or merely agreed to pay her passage. In one part of the case it is said that "she paid or agreed to pay it," and, in another, that an "advance and money" was due by her upon her passage, the freight of her baggage, insurance, &c. Hirschman sent her to this city, in the ship Waterloo, where she arrived eight weeks before the arrival of the baggage. The baggage was received here by the defendant, who paid the charges and expenses upon it, amounting to \$59.50, which included \$36.18 for advance charges, insurance, &c., in Hamburg, and \$23.32 for freight, duties, cartage, storage, and commissions, incurred or payable here. Hirschman delivered the baggage over to another shipping merchant in Hamburg, who paid the advance or money due upon it to Hirschman, and this shipping merchant consigned it to the defendant, with instructions to collect \$36.18 charges at Hamburg, which were noted on the bill of lading, together with the charges for freight, storage, commissions, &c., at New York; instructing him, further,

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not to deliver it until the charges upon it were paid. After the arrival of the baggage in New York, the plaintiff called upon the defendant, and he required her to pay the \$59.50, which she refused to do; and, as he would not deliver it until he was paid that amount, for which he claimed to have a lien upon the baggage, the plaintiff brought her action and recovered judgment for \$127, the value of the property.

The plaintiff was allowed to recover in the court below, upon the ground that there could be no lien, as Hirschman had received his whole pay for the transportation in advance from the plaintiff. In the judgment of the court, Hirschman violated his agreement and acted without authority, in transferring the baggage to another shipping merchant in Hamburg for transportation. They held that he was a special agent to do a specific act, and that if he could intrust the execution of the contract to another, the person undertaking to perform it did so in subordination to the original contract, and could acquire no other rights under it than Hirschman had. The law as laid down by the court was correct, if they were right as to the facts. If the plaintiff had paid Hirschman in advance for the transportation of the baggage from Hamburg to New York, then the case cited in the opinion of the court (*Fitch v. Goodall*, 1 Doug. [Mich.] 1) would have been in point. A carrier has the right to exact payment in advance for his services, and if the person who employs the carrier pays the carriage in advance, he cannot be required to pay it over again because another party, without his authority, performs the service. In such a case there is no privity of contract between him and the party who performs the service. That party has no lien upon the property as against him, but must look to the party who employed him, for his compensation. When employed, he had the right to exact payment for his services in advance; and, having omitted to do so, he has no superior equities to the owner of the goods, who has already paid for their carriage.

But nothing of this kind appears in the statement of facts upon which this case was heard before the court below. It does not

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appear, by the statement, that the plaintiff paid anything for the carriage of this baggage, to Hirschman. It does not appear, even, whether she paid her passage. From all that appears, she may have paid but part of it, or may merely have agreed to pay for it, and if any part of her passage money remained unpaid, Hirschman would have a lien for it upon her baggage in his possession, or in the possession of his agent. *Wolf v. Summers*, 2 Campb. 631. But it is immaterial whether the passage money was paid or not. It is very evident that the property in this case would not fall within what, in legal acceptation, is regarded as the baggage of a passenger. The baggage which a passenger is entitled to bring with him, and which is included in the general contract for the carriage of the passenger, is *ordinary baggage*, or such articles of necessity and personal convenience as are usually carried by passengers. *Grant v. Newton*, 1 E. D. Smith, 98; *Angel on Carriers*, § 115. It does not include merchandise, or all that a passenger may desire to bring with him from one place to another. Indeed, it has been restricted so far, in the case of carriage upon land, as not to include money for travelling expenses, carried in the passenger's trunk. *Grant v. Newton*, 1 E. D. Smith, 98; *Hopkins v. Hopkins*, 6 Hill, 585. In this case, what is denominated baggage, in the statement of facts, consisted of one box, two cases, and one trunk; the bulk and character of which may be judged, from the fact that the expense of its transportation from Hamburg to New York, by a single vessel, amounted to a considerable sum. In this expense were embraced charges for duties, from which it would seem that it must have included merchandise; for the personal baggage of all persons who arrive in the United States is exempt from duty. *Act of March 2, 1799*, § 46. Property, evidently so bulky as this, an emigrant would not be entitled to bring with him as baggage. The freight of it alone must have been nearly, if not quite, equal to what an emigrant would have to pay for his passage by ship from Hamburg to New York, and the court below could not have been justified in concluding that the agreement of Hirschman to send or forward the plaintiff to New York, on payment of her pas-

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sage money, included the transportation of all this property. It is said, in the statement, that he promised to send or forward her to New York in the ship Waterloo, and also to forward her baggage, and that nothing was said at the time about the freight of the baggage, except that it would be found at New York, at the defendant's. He agreed to send her by the ship Waterloo, and he did so, but it does not appear that he agreed to send the property by that vessel; for, if the property was to go by the Waterloo, the plaintiff would find it on board that vessel upon her arrival. She would in fact go with it, and there would, in that case, be no necessity to make provision for the place where she would find it in New York—no occasion for consigning it to the care of the defendant. This feature in the case, therefore, shows very clearly that something was to be paid upon it in New York—the freight for its transportation, with probably other charges, such as insurance, and, it may be, some portion of the passage money—as Ibburg, the other shipping merchant, when the property was delivered to him for shipment, to the care of the defendant, paid to Hirschman the "advance and money due by the plaintiff upon her passage, the freight of her baggage, insurance, &c."

The court below thought that Hirschman violated his agreement by delivering the property to Ibburg for shipment. Such would undoubtedly be the fact, if it appeared that he had been paid for its transportation, and had delivered it to another carrier, with the understanding that the cost of its transport was to be collected from the owner or claimant at the place of destination. But nothing of the kind appeared. He agreed to send it to the defendant, at New York, where the plaintiff was to find it, and he did so. Whether he shipped it himself, or employed Ibburg to ship it, was wholly immaterial. The contract was executed. Ibburg acted in the matter as his agent, or in subordination to the original contract. He could not and did not do anything that was not warranted by the agreement. The terms and conditions of the contract were not violated either by him or by Hirschman, for the property was sent to New York

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exactly as Hirschman had agreed to send it. Ibburg did not advise the defendant that the plaintiff was entitled to claim it; but no difficulty arose from this omission or neglect, for the defendant was willing to deliver it upon the payment of the charges. It does not, therefore, lie with the plaintiff to object that another carrier intervened. It was productive of no loss or injury to her. It did not change or vary her position under the contract. If Hirschman, instead of Ibburg, had shipped the property, she would have been required to do exactly what the defendant requested her to do—pay the charges—before she could have become entitled to have the property delivered to her. There are certain contracts the performance of which cannot be delegated to another, as where a man employs a physician or an architect; because, in such cases, the personal services and personal skill of the party employed are engaged. But employing a shipping merchant to forward four cases from Hamburg to New York is not a contract of this kind. He engages that the property shall be forwarded to New York within a reasonable time, and the means that he employs to accomplish that object are wholly immaterial. If he accomplishes it, he fulfils his contract; and this Hirschman did. Though he delivered the property to Ibburg, he remained responsible for its safe carriage, and if it was lost or injured in the course of its transport, he, and not Ibburg, was the party responsible to the plaintiff. The lien which attached to it for the charges upon its transportation was, as against the plaintiff, his lien, and the defendant, as his agent, or rather as the agent of Ibburg, who was Hirschman's agent, had a right to detain the property until the lien was discharged. The fundamental error of the court below consisted in assuming that Hirschman "had received his whole pay in advance" for the transportation of the property—a conclusion totally unwarranted by the facts. The statement of facts warrant a conclusion directly opposite; that is, that he had received nothing for this service; that it was a service distinct and independent from the plaintiff's contract for her passage in the ship Waterloo, and that there was a lien upon the property for the charges growing out of its transportation.

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from Hamburg to New York. Whether a lien existed to the full amount claimed or not, does not appear to have been agitated, as the court put their decision upon the ground that there could be no lien of any kind; and it is impossible for us to say, upon the statement before us, whether the property was chargeable with a lien to the amount of \$59 or not. All that we can say is, that it is very clear that there was a lien upon it to some extent.

Judgment reversed.

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**ALEXANDER T. STEWART and others v. MARY E. FOSTER.**

A judge should not, on supplementary proceedings, by a summary order, require trustees, who hold a trust fund of the debtor, to apply future income accruing therefrom to the payment of the judgment.

When in such proceedings the existence of a trust fund is disclosed, the judge should appoint a receiver to bring an action against the debtor and the trustee, to compel the application of any accruing income to the payment of the judgment, and should enjoin the trustee from paying over any of the moneys arising from the fund to the *cestui que trust*, for a time sufficient to enable the receiver to bring such an action.

The necessity of a suit for such purpose has not been dispensed with by the Code. By it, all the rights of the parties can be protected, the amount necessary for the support of the *cestui que trust* can be ascertained, and, by an injunction issued pending the suit, the rights of the judgment creditor can be preserved until a final adjudication can be had.

*It seems* that the provisions of the Code, for proceedings supplementary to execution, are limited to reaching property of the debtor, whether in his possession, or in the possession of others for him, and which is conceded to be his; also money due to the debtor when the order is obtained and served.

But when property or money appears to belong to him, but is in the hands of others who make claim thereto, it should be reached through a receiver.

APPEAL by defendant from an order in proceedings supplementary to execution. In December, 1856, the plaintiffs recovered judgment against the defendant for \$3,031.01. Execution

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was issued thereon and returned unsatisfied, and proceedings supplementary to execution were thereupon commenced. On the examination of the defendant, it appeared, among other things, that her father had died, leaving her, by his will, \$30,000, which was in the hands of Anthony Hoguet and Andrew C. Getty as trustees. She testified that she had only received \$1,200 per annum therefrom; that she did not know whether the trustees received any more, and that she had no regular accounts with them. Mr. Hoguet was examined, and testified that he was a member of the firm of Hoguet & Boel; that the trust funds were in their hands, subject to call, for the purpose of investment at any time; that he had made up quarterly accounts at 7 per cent. interest, which he had regularly paid to the defendant, or her order; but he was unable to give a special account of the payments without reference to his books.

Upon this examination, an order was made at chambers that said Anthony Hoguet pay to the plaintiffs or their attorney, out of the income accrued, or thereafter to accrue, from the trust moneys, the amount of the judgment with costs and interest, after paying the defendant the sum of eight hundred dollars per annum, that sum being adjudged sufficient for her support. And the defendant was enjoined from receiving, and the trustee was enjoined from paying, any larger sum to the defendant out of the income arising from the trust fund, than the sum of eight hundred dollars a year, until the judgment had been satisfied. From this order the defendant appealed.

*G. C. & E. J. Genet*, for the appellants. I. In supplementary proceedings, the court cannot order a third person to apply to the payment of the judgment moneys to become due on a contingency. *McCormick v. Kehoe*, 7 Leg. Obs. 184. II. The late Court of Chancery was authorized to compel the discovery, &c., of property held in trust for the debtor, *except* where such trust had been created by, or the fund so held in trust proceeded from, some person other than the defendant himself. 2 R. S., § 42, p. 353 (4th ed.). And see 2 Barb. Ch. Pr. p. 592. These pro-

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visions are still in force, and unaffected by the Code. III. This income of the defendant cannot be taken by her creditors. The Revised Statutes authorize express trusts: 1st, to receive the rents and profits of lands, and apply them to the use of any person during their natural life; 2d, to receive the rents and profits, &c., and *accumulate them*. 2 R. S., § 55, p. 137 (4th ed.). Limitations of contingent interests in personal property are made subject to the same rules as real estate. 2 R. S., § 2, p. 84 (4th ed.); 8 Paige, 87. And the person beneficially interested in the income is prohibited from assigning it. Previous to these provisions of the statute such an interest was assignable, and could, therefore, be reached by a creditor's bill. *Green v. Spicer*, 1 *Busa. & My.* 305; *Piercy v. Roberts*, 1 *My. & Keen.* 4; *Snowden v. Dale*, 6 *Sim.* 524. But since the legislature has made this income inalienable, it cannot be reached by creditor's bill. To allow this would be to defeat the intention of the legislature, and to allow a party to accomplish indirectly what he is forbidden to do directly.

*Henry Hilton*, for the respondents. I. Supplementary proceedings under the Code are a substitute for the former creditor's bill. *Sale v. Lawsen*, 4 *Sandf. S. C. R.* 718; *Porter v. Williams*, 5 *How. Pr. R.* 441. II. Were this a trust of real property, under the provisions of chapter 1, article 2, title 2, of part 2, 1 R. S. 727, entitled, "Of uses and trusts," § 57, subd. 3, §§ 57, 63, although the interest of the *cestui que trust* could not be aliened under § 63, yet, under § 57, the surplus, "beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, shall be liable in equity to the claims of the creditors of such person in the same manner as other personal property, which cannot be reached by an execution at law." Upon its being determined that the sum of \$800 per annum was sufficient for such support and maintenance, all the *residue* of such income is liable in equity to be applied to the claims of creditors. *Hallett v. Thompson*, 5 *Paige*, 586; *Degrau v. Clason*, 8 *ibid.* 140; *Lamereaux v. Van Rensselaer*, 1 *Barb.*

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Ch. R. 84, 37; *Bryan v. Knickerbacker*, *ibid.* 427. III. The trust is of personal property, *not subject to any of the provisions or restrictions of the Revised Statutes relating to trusts of real property*; the interest of the defendant therein is unrestrained, *is alienable by her*, and, like any other property which cannot be reached by execution, is liable in equity to be applied to the payment of the claims of judgment creditors. 1 R. S., 773, § 2; *Clute v. Boul*, 8 Paige R. 85; *Kane v. Gott*, 24 Wend. 641 and *post*; *Bryan v. Knickerbacker*, *supra*; *Leggett v. Perkins*, 2 Comst. 297, 322; Code, §§ 297, 298, 302.

INGRAHAM, FIRST JUDGE.—There is nothing, in the evidence in this case, which shows that the trust created in the hands of Hoguet & Getty, as trustees for the benefit of the defendant, was not created by herself, and that the whole fund was not liable to her debts.

Supposing, however, that the trust was required by the will of the defendant's father, then, secondly, it appears that the annual income was \$2,100, of which the defendant has received only \$1,200, and no explanation of the disposition of the residue is shown. It is true the trustee Hoguet says the amount was paid over quarterly, but the defendant states as positively she has not received it.

There is ample room for an order for the appointment of a receiver, to collect whatever amount remains unpaid of such income, whether in the hands of the trustees or of any other persons.

Thirdly, I am of the opinion that the proceedings, to reach the income to accrue under the trust, cannot be taken under those contemplated by the provisions of the Code supplementary to execution. Those proceedings are, I think, limited to reaching the defendant's property in his possession, or in the possession of others, but which is conceded to belong to the debtor, and money due to the debtor, when the order is obtained;—by a direct order; and to reach also property of the debtor, or money in the hands of others, to which they make a claim; through a receiver. But

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when a creditor would compel the application of the accruing income of a debtor from a trust fund to the payment of his debts, then the proper course of proceeding is by an action against the debtor and trustee (*Bramhall v. Ferris*, 4 Kernan, 41), in which all the rights of the parties can be protected and the amount necessary for the support of the *cestui que trust* can be properly ascertained. The statute contemplates suits in equity for that purpose. The Code has not substituted supplementary proceedings in its place. An action is still necessary, and an injunction in such an action could properly protect the creditor until the facts necessary to a correct adjudication were ascertained.

I think the order at chambers should be modified so as to order the appointment of a receiver, and to restrain the defendant from receiving, and Hoguet from paying, any of the ~~interest~~ which accrued from the trust funds prior to the 15th April, 1857; and also restraining the trustees from disposing of the trust fund in any way to the injury of the plaintiffs, for a time sufficient to allow the receiver to commence an action against the trustees, to compel an application of such trust fund to the payment of the plaintiffs' judgment, and that the residue of the order appealed from should be vacated.

Ordered accordingly.

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**CHARLES G. STOPPANI, assignee of Jean Schoenfeld, v. CHARLES B. RICHARD.**

S. leased certain premises to N., by whom the lease was assigned to Sch. He assigned the lease, in turn, to W., taking an agreement from him to pay the rent, and from R. an agreement as surety for the punctual payment thereof.

*Held*, that the agreements were without consideration and void.

Sch. was liable for rent only so long as he remained assignee of the lease, and was relieved of that liability by his assignment of the lease. W., by his acceptance of the assignment, became liable to S., the original landlord; and his agreement to pay the rent to Sch., his immediate assignor, and R.'s agreement as his surety, were therefore without consideration, and neither he nor the surety was liable to Sch. or his assignee thereon.

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APPEAL by plaintiff from a judgment of the Marine Court.

Charles G. Stoppani leased the premises No. 82 City Hall Place to Joseph Nathan, for the term of three years from the first of May, 1854, E. Cottenger becoming Nathan's surety for the punctual payment of the rent. Nathan assigned the lease to Jean Schoenfeld, who, in turn, assigned it to J. W. Weinrich, who agreed to pay the rent therefor to Schoenfeld, the defendant, C. B. Richard becoming his surety therefor. The rent not having been paid, Schoenfeld assigned this agreement to Stoppani, who brought this action thereon to recover the rent from Richard. Judgment was given for the plaintiff, which was reversed at the general term of the Marine Court. The plaintiff appealed from such judgment of reversal.

*C. W. Voorhis*, for the appellant, cited *Post v. Jackson*, 17 Johns. R. 239, 479.

*F. S. Stallknecht*, for the respondent

DALY, J.—Schoenfeld was the assignee of the lessee Nathan, and as long as he continued such assignee he was liable, by privity of estate, for the rent, to the lessor Stoppani; but, by assigning to Weinrich, he discharged himself from all future liability for rent under the lease. *Lekeux v. Nash*, 2 Strange, 1221; *Taylor v. Shum*, 1 Bos. & Pul. 21. Weinrich was, then, in privity of estate with the lessor Stoppani, and liable to him for the rent. Nathan, the lessee, continued liable upon his personal covenant in the lease; Cottenger, upon his covenant that Nathan would perform the contracts in the lease; and Weinrich, as the one in privity of estate with the lessor. All these parties remained liable for the payment of the rent, but the liability of Schoenfeld was at an end. Schoenfeld having released himself from the payment of rent by the assignment, there was nothing to support an agreement by Weinrich to pay the rent to Schoenfeld; for, by the operation of the assignment, Weinrich became liable to pay it to Stoppani, the lessor. Schoenfeld was discharged from all

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the covenants in the lease. Weinrich was not his under-tenant or leasee, but the assignee of the term. Such an agreement, therefore, would be without consideration and void, and consequently any agreement by Richard, the defendant, to be responsible to Schoenfeld if Weinrich should make default, was equally void and without consideration. If Schoenfeld acquired nothing by that agreement, he could transmit nothing by assigning it to the plaintiff. Neither he nor the plaintiff could maintain any action upon it, and the general term, therefore, did right to reverse the judgment.

The case of *Jackson v. Post* (17 Johns. 479), to which the appellant has referred us, has no application. The action there was by the lessee against the assignee, upon a special covenant in the assignment, by the assignee, to pay the rent to the lessor; and as a lessee continues always liable upon the covenants in the lease after he has assigned, if there was a sufficient consideration to support such a covenant. If Schoenfeld had entered into such an agreement in the assignment from Nathan, the lessee, the two cases would be analogous; but such an agreement by Schoenfeld with his assignee, or with a surety for his assignee, is a very different case. The judgment of the general term should be affirmed.

Judgment affirmed.

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JOHN H. COON, assignee of Patrick McCabe v. ROBERT O. REED.

McC. sold and delivered a horse to R., warranting him to be sound. The horse was delivered Saturday, and was to be paid for the Monday following. On that day R. refused to complete the purchase and pay the money, alcgging, as the reason, that the horse was lame, and McC. refusing to take him back, R. sent him to a livery stable, from which, after two or three weeks, McC. took him. The horse was lame while in R.'s possession. *Held*,—

L That McC. by taking back the horse, rescinded the contract, and could not recover damages for R.'s breach thereof.

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II. That he was entitled, however, to recover, as damages, from R. the expenses to which he had been put in curing the horse of his lameness, and the keep of the horse at the livery stable.

III. But, there being no proof as to these expenses, the complaint was properly dismissed.

**APPEAL**, by plaintiff from a judgment of the Fourth District Court. The facts are fully stated in the opinion of the court.

*H. P. Townsend*, for the appellant.

*G. O. Hulse*, for the respondent.

BRADY, J.—The assignor of the plaintiff sold and delivered a horse to the defendant on a Saturday, and the defendant promised to pay the price demanded on the following Monday. He declined, however, to do so, alleging that the horse was lame, and that the warranty of soundness given at the time of the sale had been violated. The defendant then insisted upon the vendor's taking back the horse, which being declined he sent him to a livery stable. After he had remained there for some weeks, the vendor took him into his possession, and having assigned the claim which he made against the defendant, this action was brought to recover for the expenses incurred in curing the horse, the amount paid for his keeping, and the loss sustained by the failure of the defendant to perform his agreement. After proof of the facts and the damages, the justice dismissed the complaint, upon the ground that the contract had been rescinded by the vendor, and that he had, therefore, no cause of action. The proof, in the case, establishes the fact that the horse was not lame at the time of the sale and delivery, and, in the absence of proof to the contrary, the legal presumption is, that he was lame while in the possession of the defendant, and intermediate the delivery and the demand of payment, and the day agreed upon. The right of the vendor to have sued upon the original contract seems to be conceded. The sale was perfect, and the vendor was not obliged to take the horse back in the absence of proof

## Coon v. Reed.

of fraud, or the violation or falsity of the warranty. The defendant, having sent the horses to livery, was responsible for his keep, there being no privity between the keeper of the horse and the vendor. The latter, however, by reducing the horse again to his possession, waived his right of action for the price, and rescinded the contract of sale. In *James v. Colton* (7 Bing. 266), the plaintiff engaged to let land to the defendant on building leases, and to lend him £6,000 to assist him in the erection of twenty houses on the land. The defendant agreed to build the houses and convey them as security for the loan, which was to be paid at a time agreed upon. When the six houses had been built, and part of the £6,000 had been advanced, the plaintiff requested the defendant not to go on with the other fourteen houses, and the defendant desisted. It was held that this amounted to a rescission of the contract by mutual consent, and the plaintiff was allowed to recover the amount advanced, on account for money lent. And although the contract here might be regarded as rescinded, the vendor was entitled to be placed in *statu quo*. The contract being rescinded, the rescission extended back to the Saturday when the horse was delivered, and the defendant would be liable, as a bailee, for damages, on proper proof; but whether that be so or not, the defendant having received the horse on a contract of sale which he refused to perform, and the horse presumptively having been injured in his possession, the plaintiff was entitled to be placed in *statu quo*, and I think he was also entitled to recover for the expenses of curing the lameness of the horse, by way of damages. Of this there was no proof, and the judgment was therefore right.

Judgment affirmed.

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JOHN KELLY v. WILLIAM G. BROWER.

Where a cause, pending in a district court, was adjourned to the 19th, and on the 18th the plaintiff appeared before the justice, and represented to him that the cause had been adjourned to that day, and the justice (his own entry of the adjournment being indistinct) allowed the plaintiff to take an inquest, and rendered judgment in his favor; *held*, that the judgment must be reversed, for error in fact. The affidavits of the parties being in conflict as to whether the adjournment was made to the 18th or to the 19th, *held*, that the return of the justice must govern upon that question.

APPEAL by defendant from a judgment of the Third District *Court*. The appeal was taken on the ground of error in fact; that the judgment was prematurely rendered in the absence of defendant, on the 18th of March, when the cause had been adjourned to the 19th. Affidavits were submitted on both sides, on the question whether the 18th or the 19th was, in fact, the adjourned day. The court, however, determined this question chiefly upon the justice's return, the substance of which is stated in the opinion.

*J. A. Sherman*, for the appellant.

*T. D. Sherwood*, for the respondent.

DALY, J.—The appeal is not brought for relief from a judgment by default or for error of law, but for error of fact in rendering judgment before the day to which the cause was adjourned.

The defendant, by joining issue on the merits, waived any defect in the process by which he was brought into court. *Andrews v. Thorp*, 1 E. D. Smith, 615.

The parties are in conflict as to the day to which the cause was adjourned. In such a case the return of the justice, who is a disinterested party, and who has had an opportunity of in-

## Williams v. Carrington.

specting the entry made by him upon the summons, must determine the matter. He returns that, when the cause was called, he found the entry on the summons of the day of adjournment to have been altered and indistinct, and, upon the plaintiff representing to him that it was adjourned to the 18th, he allowed the plaintiff to take judgment; but that, after a particular examination of the summons, he was satisfied that the cause was adjourned to the 19th. We must, therefore, conclude that the cause was adjourned to that day, and, as judgment was given on the previous day, it must be reversed for error of fact.

Judgment reversed.

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**GEORGE H. WILLIAMS and others v. JAMES H. CARRINGTON.**

The acceptance by a creditor, from his debtor, of a sum less than the entire debt in full payment and discharge, and the giving of a receipt therefor, expressed to be in full, does not operate to discharge the debtor. He can be discharged only by a release under seal.

But a mutual agreement by various creditors with each other to receive from a debtor a sum less than their respective claims, or such an agreement by a single creditor with his debtor, upon the faith of which other creditors are induced to make a similar compromise, is binding. The benefit which each creditor gains by the engagement of the others to forbear, and the consequent securing of a fund for the mutual benefit of all, is a sufficient consideration to sustain such an agreement.

*It seems that where the debts lie in simple contract the composition agreement may be by parol.*

C, having made an agreement with a number of his creditors to compromise at the rate of forty cents on the dollar, made a similar agreement with one W., to whom he paid forty per cent. of his indebtedness to him, receiving from him a receipt in full. He also gave him a sealed agreement to give his note for forty per cent. additional as soon as his compromise should be completed with all his creditors, on condition that W. would sign a paper purporting to compromise his claim for forty per cent. The latter engagement was never performed.

*Held.* there being no evidence that the other creditors of C. were induced to compromise by the action of W.; that W. was entitled to recover the balance of his debt from C.

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APPEAL by defendant from a judgment of the Marine Court. The defence was accord and satisfaction by a compromise, by which the plaintiff agreed to, and did receive forty per cent. of his claim in full payment and discharge. The facts are fully stated in the opinion of Judge Ingraham.

*H. & C. S. Andrews*, for the appellant.

*McCunn & Moncrief*, for the respondents.

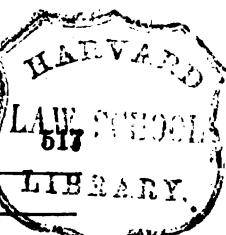
INGRAHAM, FIRST JUDGE.—The defendant, having made a composition with several of his creditors at forty cents on the dollar, made a similar agreement with the plaintiffs, by which he agreed to pay the plaintiff forty cents, and did thereupon pay to the plaintiffs the amount of such per centage, and received from them a receipt, purporting to be in full of account. The defendant also, on the day previous, gave a scaled instrument, by which he bound himself to give his note at twelve months for an additional forty per cent., as soon as his compromise should be effected, on condition that the plaintiffs would sign a paper purporting to compromise his indebtedness to them for forty cents.

It was never completed, and the plaintiffs now bring this action for the debt due them. If the plaintiff had signed a composition deed with other creditors for a fixed rate, any private agreement for a further sum would be void, and the plaintiffs would be bound by their compromise. But such a principle does not extend to a mere agreement by the debtor with his creditor to pay a less sum than the debt and be discharged. Nor, if carried out, is a mere receipt in full a bar to an action for the balance of the debt, if it appear that only a part of the debt has actually been paid.

But it is not necessary that a composition deed should be actually signed by the party in order to make the composition valid. If the claim of the creditor is a simple contract, a parol agreement to compromise, by which other creditors are led also to

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compromise upon the faith of such a parol agreement, is valid, and discharges the debt. *Bradley v. Gregory*, 2 Camp. 383; *Steinman v. Magnus*, *ibid.* 124. In *Fellows v. Stevens* (24 Wend. 294), Justice Cowen says, "Where the debts reside in simple contract, I see no reason, if clearly proven, why an oral composition would not be equal to any other."

In *Heath v. Crookshanks* (2 T. R. 24), it was held that such an agreement was not binding merely as an accord, without payment and acceptance of the amount. But, on payment and acceptance, such a composition would be held valid.

In the present case, the creditors received the forty per cent. which they had agreed to accept, and gave a receipt therefor in full, and the account on the plaintiffs' books was carried to profit and loss. The agreement which the plaintiffs took from the defendant, to pay a further forty per cent., was not to be binding until the compromise was concluded, and one of the plaintiffs, who was examined as a witness, says that some of the creditors called to see them in relation to the compromise; but there is no evidence that the plaintiffs ever executed any compromise deed, or that any other creditor was ever induced to enter into a compromise with the debtor in consequence of such an agreement with the plaintiffs. Before the defendant is entitled to such a defence, he should have established one or the other of these facts. No proof was offered in regard to either, and the case is then left with the mere agreement to pay a less sum than the debt in discharge of the whole, and a receipt in full given therefor. It is well settled, that the payment of a less sum than the real debt will be no satisfaction without a release under seal. *Seymour v. Minturn*, 17 J. R. 169.

The receipt is not conclusive upon the parties. It does not show that the debt is paid in full, but that a debt of a larger sum was paid in full by the payment of \$130. The evidence is not to alter the written paper, but to show that the debt cancelled by the payment of \$130 was much larger.

There is nothing in the rule against varying written instruments by parol which would have excluded the evidence; and

## Williams v. Carrington.

even if there was, the defendant did not except to it when offered.

There is no ground on which we can interfere with this judgment, and the same should be affirmed.

DALY, J.—It was essential, in this case, to show that other creditors had consented to accept the forty per cent. in discharge of their claims in consequence of the plaintiffs' consenting to do so. The consideration which supports such an agreement, when it is not under seal, is the mutual understanding, among all who become parties to it, that each is to take the composition agreed upon, and forbear further to press or insist upon their claims. It is said in *Good v. Cheesman* (2 Barn. & Adolph. 328), by Lord Tepperden, "that a creditor shall not bring an action where others have been induced to *join him* in a composition with the debtor; each party giving the rest reason to believe that, in consequence of such engagement, his demand will not be enforced. This is, in fact, a new agreement, substituted for the original contract with the debtor; the consideration to each creditor being the engagement of the others not to press their individual claims." It must appear that the act of the plaintiff, in accepting the forty per cent., operated as an inducement to other creditors to do the same, otherwise it is but the acceptance of a lesser sum for a greater, which is no satisfaction. Thus in *Lowe v. Equitar* (7 Price, 604), the plaintiff agreed with the defendant to execute a deed of composition with the other creditors, and take the benefit of the composition with them, in consideration, that the defendant would also deliver to him a picture of the value of £500. The picture was delivered and accepted by the plaintiff in full satisfaction of his claim, and the defendant and all the other creditors, *except the plaintiff*, signed the composition deed. The plaintiff sued for the original debt, and a plea setting up these facts was held to be no bar. I am inclined to think, from the report of this case, that the picture was accepted in lieu of, or as a payment of the composition, and if so, it was a case, in its essential features, like the present. Where creditors meet

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together, and the terms of the composition are arranged, as was the case in *Cockshot v. Bennett* (2 Term Rep. 768), or as in *Good v. Cheesman, supra*, put their names to an agreement or memorandum of the term, all the creditors present at such meeting, or all who sign the writing, enter into a mutual engagement, each with the other, to accept the amount proposed by way of compromise, and to forbear further to insist upon their claims. Where creditors thus mutually agree with each other, the beneficial consideration to each creditor is the engagement of the rest to forbear. A fund is thereby secured for the general advantage of all; and if any one of the parties were allowed afterwards to enforce his whole claim, it would operate to the detriment of the other creditors who have relied upon his agreement to forbear, and might even deprive them of the sum it was mutually agreed they should receive, by putting it out of the power of the debtor to carry out the composition. I know of no case, however, in which an acceptance, by a creditor from his debtor, of a certain sum in discharge of his debt, where other creditors have done the same, has been held to be a satisfaction, unless there was something in the case to show that the other creditors acted with the knowledge of his concurrence, and it could be assumed that their agreement necessarily contemplated and was founded in the benefit and advantage to be derived from his agreement also to forbear—in the language of Lord Tenterden, that they “were induced to join him in the composition.” It is very probable, in this case, that such was the fact—very probable that the plaintiffs signed the composition, but nothing of the kind appears in the evidence. For all that appears in the testimony, the other creditors may have accepted the forty per cent. without knowing that the plaintiffs had received that sum, or had agreed to accept it. We would not be justified in presuming, upon this evidence, that they did, against what must be regarded as a direct finding by the judge below, that they did not. We would have to hold that the judgment he gave was against evidence, and we could not, I think, go that length.

The judgment must be affirmed; but, as the question is not

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very fully discussed by either party upon the written argument submitted, and as it is of a good deal of practical importance, I think the defendant should be allowed, if he wishes it, to carry the case to the Court of Appeals.

BRADY, J., dissented.

Judgment affirmed.

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**PHILIP NEUSBAUM v. GEORGE A. KEIM, MARY E. KEIM and  
WARD B. CHAMBERLIN.**

In order to sustain an action, brought by a creditor to set aside, as fraudulent and void, a conveyance of real estate made by his debtor, the plaintiff must show a judgment recovered in his favor against the debtor. Unless he stands in the relation of judgment creditor he cannot attack such conveyance.

In such an action the grantees of the debtor's estate may impeach the judgment, either by showing it to be fraudulent upon its face, or by evidence *aliunde*. Only the parties to a judgment are concluded by it.

When the plaintiff's judgment is entered upon confession, they may object that the statement upon which it is entered is insufficient to sustain the judgment, and if such be the case the plaintiff's complaint will be dismissed.

A statement that the plaintiff sold to the defendant a quantity of meat in the years 1854 and 1855, and that there was justly due to the plaintiff, upon such sale, a certain specified balance, is insufficient to sustain a judgment thereon.

Such a judgment is void, and cannot be sustained by proof *aliunde* of the facts in detail; out of which the indebtedness arose.

**APPEAL** from a judgment dismissing the plaintiff's complaint. This action was brought by the plaintiff as judgment creditor of the defendant George A. Keim, to set aside, on the ground of fraud, a conveyance made by George A. Keim and his wife to the defendant Chamberlin, and by him conveyed to Mary E. Keim, the wife of George A. Keim. Upon the trial, the plaintiff offered in evidence a judgment in his favor, against the defendant George A. Keim, entered on confession. The state-

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ment upon which the judgment was entered is stated in the opinion of the court. The defendants objected to the judgment, on the ground of the insufficiency of the statement, and moved to dismiss the complaint. The counsel for the plaintiff then offered to prove, in detail, the facts out of which the indebtedness, as set out in the confession, arose. This offer was overruled, and the complaint was dismissed. From the judgment of dismissal, the plaintiff appealed.

*F. Byrne*, for the appellant. I. The statement and confession on which judgment was entered for the plaintiff embodied all the elements for its validity required by the Code. *Schoolcraft v. Thompson*, 9 How. Pr. R. 61; Code, § 383. II. Even if insufficient so that it would be set aside upon motion by creditors of George A. Keim, it cannot be impeached collaterally in this action, by persons who are not creditors.

*Spier & Nash, and A. V. W. Van Vechten*, for the respondents. I. The judgment offered to be read in evidence by the appellant was void for uncertainty, in not complying with the provisions of the 383d section of the Code. The statement in the confession does not set forth concisely the facts out of which the debt arose. Code, § 383, subd. 2; *Chappel v. Chappel*, 2 Kernan, 215; *Boyden v. Johnson*, 11 How. P. R. 508; *Schoolcraft v. Thompson*, 7 ibid. 446; *Stebbins v. East Society of the Methodist Episcopal Church, Rochester*, 12 ibid. 401; *Greenwood v. Donaldson*, ibid. 142; *Davis v. Morris*, 21 Barb. S. C. R. 152.

II. The offer to prove by witnesses, in court, the consideration and facts of the alleged indebtedness in support of the judgment, was properly overruled by the court. In the language of Strong, Justice, it would be giving vitality to an act before it had a valid conception. *Boyden v. Johnson*, 11 How. 508.

This action is founded upon a judgment—the issuing of an execution thereon, and its return unsatisfied. It will not be contended that this action could be sustained without the judgment.

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DALY, J.—This action was brought to set aside a conveyance of real estate, made, first, by Keim and wife to Chamberlin, and then by Chamberlin to Keim's wife, upon the ground of fraud. To enable the plaintiff to maintain the action, it was necessary for him to show that he had a judgment against Keim (*Reubens v. Joel*, 3 Kernan, 488); for, unless he stood in the relation of a judgment creditor, he could not attack the conveyance of Keim and wife to Chamberlin. He offered the record of a judgment in evidence, and, as between him and Keim, that record was conclusive. Neither of the parties to that judgment could attack it collaterally in any subsequent proceeding. But Chamberlin and Mrs. Keim, who was Chamberlin's grantee, were not estopped from impeaching it. They were not parties to the judgment, and a judgment is conclusive only upon parties to it, or those succeeding to their rights, or standing in the same relation or character. 2 Phillips, 42; *Duchess of Kingston's case*, 20 How. S. T. 538; 2 Cow. & Hill's Notes, note 10 to note 88. Mrs. Keim and Chamberlin had nothing to do with the judgment; were in no way bound or affected by it, and it was competent for them to maintain that Neusbaum was not a judgment creditor, by showing that the judgment was fraudulent upon the face of the record, or to impeach the *bona fides* of it by evidence *aliunde*, and if they succeeded in doing so, they established that the plaintiff had no right to bring the action.

They objected, upon the trial, that the statement of facts upon which the judgment was entered up was not in compliance with the Code. The statement was in these words: "The confession of judgment is for a debt justly due to the plaintiff, arising upon the following facts: the said plaintiff, at various times, in the years 1854 and 1855, sold and delivered to me large quantities of meat, and upon such sale there is now justly due to the plaintiff, as aforesaid, a balance in the said sum of \$2,114, with interest thereon, from the 18th day of February, 1855." The objection was sustained, and the plaintiff then offered to prove the consideration and facts of the indebtedness in detail in sup-

## Neusbaum v. Keim.

port of the judgment, but the court refused to allow him to do so, and the complaint was dismissed.

If the statement upon which the judgment was entered up was insufficient, the plaintiff could not help it out by evidence *aliunde* at the trial. It was no judgment, unless it was entered up in conformity with the requisitions of section 383 of the Code. *Boyden v. Johnson*, 11 How. 506.

I think the decision of the judge at the trial was correct. What the Code requires is a statement of facts and not conclusions. There must be a concise statement of the facts out of which the indebtedness arose. The fact stated is, that the plaintiff sold and delivered to the defendant Keim, at various times, in the years 1854 and 1855, large quantities of meat; then follows a conclusion that there was then justly due to the plaintiff, upon such sale, a *balance* in the sum of \$2,114. This is not stating facts which show the existence of an indebtedness to \$2,114—facts from which the legal and logical conclusion is, the existence of an indebtedness to that amount. If there was a balance, that balance was the difference between the whole amount or value of the meat furnished, and the amount by which it was reduced, either by payment, set-off or otherwise, and that must appear, or there is no statement of the facts. It is simply stating that there was a balance due the plaintiff of \$2,114, upon a sale of meat, without showing the facts out of which that balance, which is the indebtedness, arose, further than that it arose from a sale of meat, the amount or value of which is not stated, nor the amount by which it was reduced, nor how, whether by payment, set-off or otherwise. In the most essential requisite, it is but the statement of a conclusion, founded upon facts not disclosed, and known only to the party making the statement. In view of the end designed to be accomplished by the new provision, which was, to furnish additional security to creditors against a fraudulent combination by the parties to a judgment, it would never do to sanction such a mode of stating the facts out of which the indebtedness arose. *Chappel v. Chappel*, 2 Kern. 215. They are to be stated concisely, not with the minuteness and detail of

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a bill of particulars, but the substantial facts must appear which show how the indebtedness arose:—not the inferences or conclusions of the party making the statement. *Boyden v. Johnson*, 11 How. 503; *Schoolcraft v. Thompson*, 9 ibid. 61; 7 ibid. 446; *Post v. Coleman*, 9 ibid. 64; *Stebbins v. East Society*, 12 ibid. 410; *Greenwood v. Donaldson*, ibid. 142; *Davis v. Morris*, 21 Barb. 152; *Delaware v. Ensign*, ibid. 85.

Judgment affirmed.

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**JOHN J. VAN ALLEN v. JOHN N. ALLEN and others.**

V. sold a horse to A. for \$130—\$70 in cash, and \$60 in A.'s due bill. He represented the horse to be sound and kind, and agreed that A. might try him, and if the horse did not prove satisfactory he would take him back and return the money and the due bill. A., after trying the horse, and having full knowledge of the fact that he had a crack in his hoof, told V. that the horse suited him, and he never returned or offered to return him. In an action on the due bill, A. set up, as a defence, a breach of warranty. *Held*—

I. That there was no warranty. If A. was not satisfied with the horse, he should have returned him.

II. The evidence showing that the horse was worth \$130, and no proof given as to his value without the defect, therefore, even assuming that there was a warranty, the defendant had shown no damage, and the plaintiff was entitled to judgment.

Parol evidence is inadmissible to show that a due bill, purporting to be payable immediately, was intended to be payable at a different time.

APPEAL by defendants from a judgment of the Sixth District Court. This was an action on a due bill made by the defendants in the following words:

“New York, April 9th, 1857.

“Balance due Mr. John J. Van Allen sixty dollars on one horse.

“\$60.

(Signed)

ALLEN BROTHERS.”

## Van Allen v. Allen.

The nature of the defence and the facts in the case are fully stated in the opinion of the court.

*Diesendorf & Aiken*, for the appellants.

*Thomas J. Kipp*, for the respondent.

HILTON, J.—On April 9th, 1857, plaintiff sold and delivered a horse to the defendants for \$130, and represented the animal to be sound and kind. Upon the delivery, \$70 was paid in cash, and \$60 in the due bill on which this action is brought. The defendants were to try the horse, upon the agreement that, if they did not like him, the plaintiff would take him back and return the money and due bill. The horse was used by the defendants in their ice business. After the first day's use, and with a full knowledge by them of the existence of a crack in his hoof, they informed the plaintiff that the horse suited them.

They never returned, or offered to return, the horse, but upon being sued on the due bill set up as a defence—

1st. That the due bill was not to become payable until a reasonable time after they should become satisfied with the horse.

2d. That the horse was warranted sound and kind, whereas he was baulky, and, by reason of the cracked hoof, was unsound, constituting a breach of the alleged warranty, whereby the defendants sustained damage, &c.

As to the first ground of defence, it is sufficient to say, that the due bill, on its face, purported to be and was due and payable immediately (*Cornell v. Moulton*, 3 Den. 12), and parol evidence was inadmissible to show that it was intended to be payable at a different time. *Fitzhugh v. Runyon*, 8 John. 375; *Thompson v. Ketcham*, ibid. 190.

As to the second, admitting that there was a warranty, the defendants have shown no damage. They purchased the horse for \$130, and the evidence is that he is now worth that sum. There

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is no testimony whatever showing what would be his value without the crack in his hoof.

But there was no warranty. The horse was sold upon the agreement that the defendants were to use him, and determine whether they would keep or return him. They did use him, expressed themselves satisfied, never offered to return him, and should now pay the price they agreed to.

Judgment affirmed.

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#### CHRISTIAN SPRING v. WILLIAM BAKER.

Upon appeal from a judgment rendered by default in a district court, the justice's return showed that the summons and complaint, verified, were returned, by a constable of the city, duly served, and that, the defendant not appearing on the return day, judgment was rendered for the plaintiff for the amount claimed, without further proof. The complaint was neither set out in the return nor referred to as annexed. *Held*, insufficient.

Where judgment is rendered in a district court without proof, and on default, upon a constable's return of the personal service of a summons and complaint, the statute must be strictly complied with. The justice's return, in such a case, should show that a copy of the complaint was served, verified by the party pleading, or his agent or attorney, as the case may be. A mere return that the summons was served with the complaint is not sufficient.

And the return should either set out the complaint served, or, if it is annexed thereto, should refer to it as the complaint upon which judgment was rendered.

Whether a claim for a balance of account, on a settlement of partnership affairs, is assignable. *Quere? per Daly, First Judge.*

**APPEAL** by defendant from a judgment entered by default in the Second District Court. The return of the justice stated that a summons was duly issued, requiring the defendant to appear and answer, &c.; "that the said summons was, by the return, duly made thereon by R. Carpenter, one of the constables of the city and county of New York, certified to have been served, with the complaint verified, on the defendant in person in the city of New York, on the 12th day of June, 1857;" that on the return

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day the plaintiff appeared, but the defendant did not, whereupon judgment was rendered for the plaintiff for the amount specified in the summons and complaint, without further proof. A verified complaint, entitled in the cause, was attached to the return, but was not referred to therein. This complaint averred that the defendant was indebted to one — Cornell in the sum of \$47, "on an account, for the settlement of the closing of a partnership of the firm of Baker & Cornell," which account and claim were assigned by Cornell to the plaintiff "on or about the — day of —," and averred a demand of payment thereof from the defendant, and a refusal by him to pay.

*John Baker*, for the appellant.

*Peterson and McConnell*, for the respondent.

**DALY, FIRST JUDGE.**—The return does not show that the complaint upon which the judgment was rendered was served with the summons, or upon what complaint the judgment was given. It does not show that the complaint was verified by the oath of the party pleading, or by whom it was verified, or even state that it was duly verified. The return is simply that the summons was, by the constable's return, certified "to have been served with the complaint verified."

Under the new provision, by which, in cases of default, judgment may be taken upon the complaint without proof, it must appear that the statute has been strictly complied with. What appears to have been a complaint is annexed to the return, but it is not stated to have been the complaint served, or upon which the judgment was rendered. *Litchfield v. Burwell and others*, 5 How. Pr. R. 341. If it was, it was insufficient, as it does not aver when the claim in suit was assigned to the plaintiff; and, even if that had been averred, I think it doubtful whether it states sufficiently any cause of action which could have been the subject of an assignment.

Judgment reversed.

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Britton v. Hall.

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## WINCHESTER: BRITTON v. GEORGE V. HALL.

In an action upon a promissory note, between the original parties to it, a failure of consideration is a good defence.

But proof of such failure is not admissible, in an action against the maker by an endorsee, where there is no evidence impeaching his title.

When a note is transferred after maturity, it is taken subject only to the defences existing against it in the hands of the holder when it matured.

Proof of equities, constituting a good defence as between the original parties, is not admissible in an action by one who has received the note after maturity, if his assignor was a *bona fide* holder before maturity, and without notice of existing equities.

**APPEAL** by defendant from a judgment of the Marine Court at general term. This action was brought upon a promissory note made by the defendant, payable to the order of one A. B. Capwell, and endorsed by him. It was discounted at the Atlantic Bank, in the city of New York, for Mr. Capwell, was protested for non-payment, and was taken up the day after; by whom it did not appear. But the cashier testified that neither the note nor the amount of it was charged back to Mr. Capwell by the bank.

The defendant offered to show that the note was given for goods sold by A. B. Capwell, the payee of the note, to the defendant, and that, by reason of misrepresentations as to the quality of the goods, the consideration, to the amount of eighty dollars, failed. The court excluded the evidence and rendered judgment for the plaintiff, which was affirmed by the Marine Court, at general term. The defendant appealed.

*Beebe, Dean and Donohoe*, for the appellant.

I. As between the original parties to the note, the failure of consideration is a good defence. 17 Johns. R. 304; 7 Cowen, 822; 9 Wend. 373.

II. In this case, A. B. Capwell, the payee, was the owner

## Britton v. Hall.

of the note, though it was in the possession of the Atlantic Bank.

*A. B. Capwell*, for the respondent.

I. The justice, on the trial, properly rejected defendant's offer to show a partial failure of consideration to the note in suit, as between the maker and payee.

1. When an action is brought by an indorsee, or other third person who is not named in the note, the maker cannot set up any equities existing between himself and the payee, until he has impeached the plaintiff's title. *Nelson v. Cowing*, 6 Hill, 336.

2. The bank, being a *bona fide* holder for value without notice, the plaintiff's title is perfect, and no equities between the maker and the payee can be set up.

One who takes a note after due, takes it subject to all defences existing against it in the hands of the holder when due, only. *Williams v. Matthews*, 3 Cowen, 252; *De Mott v. Starkey*, 3 Barb. Ch. 403; *Reed v. Warner*, 5 Paige, 650.

A partial or total failure of consideration, or even fraud, between the antecedent parties, will be no defence, even though the present holder has notice, provided he derive a title to the note from a prior *bona fide* holder for value. Story on Prom. Notes, § 191, and cases cited.

II. The offer was properly rejected, as in itself too general and indefinite. He should have gone further and offered to show explicitly what was the *defect* in the goods, and what was the difference occasioned thereby—the quality of the goods contracted for, and the quality delivered—and whether plaintiff or payee had any notice of the defect, and that defendant had offered to return the goods delivered before the action was commenced, or some excuse for not having made such an offer. *Castle v. Woodhouse*, 1 Code Reporter, 72.

BRADY, J.—The Atlantic Bank discounted the note, on which the action was brought, for Capwell, the payee, and the note remained in the possession of the bank until maturity and protest. The day after it was protested it was taken up, but by

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*Desmond v. Rice.*

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whom does not appear. The note was not charged by the bank to Capwell, the payee. The defendant's offer was to show that, in the hands of the payee, there was a failure of consideration; and this offer seems to have been predicated on the assumed fact that the note belonged to the payee, though in the possession of the plaintiff. The bank, having discounted the note, was a *bona fide* holder before maturity and without notice of existing equities, and, on the facts proved, the presumption was that the note was transferred by the bank to the plaintiff. There is no evidence showing any transfer to the payee or re-delivery to him, or payment by him to the bank of the amount of the note. The evidence offered, therefore, was inadmissible, because there was no evidence impeaching the plaintiff's title. It is well settled that, as between the original parties to a note, failure of consideration is a good defence; and it seems to be equally well settled, that where a note is transferred after maturity, it is taken subject only to the defences existing against it in the hands of the holder when it matured. *Chalmers and others v. Lanion*, 1 Campb. 383; *Driggs v. Rockwell*, 11 Wend. 505; *Williams v. Matthews*, 3 Cowen, 260; *Andrews v. Pond*, 13 Peters, 79. The defendant had a right to examine the plaintiff, and could in that mode, doubtless, have proved the manner in which and the person from whom the plaintiff obtained the note. He did not do so, and has failed to lay the foundation for his defence.

Judgment affirmed.

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**FLORENCE DESMOND v. CHARLES A. RICE and JAMES E. BARKER.**

In an action upon negotiable paper, which has been lost, the giving of a bond under the statute (2 R. S. 406, § 76), with sufficient sureties, conditioned to indemnify the defendant against all claims by any other persons on account thereof, is an essential pre-requisite to any recovery thereon.

## Desmond v. Rice.

APPEAL by defendants from a judgment of the Fourth District Court. The action was upon two orders for \$10 each, negotiable, given, the one to Cornelius Desmond and the other to Robert Williams, and both assigned to the plaintiff. The drafts were lost by the plaintiff, and were not produced on the trial, nor was any bond of indemnity against them tendered. It did not appear that the defendants made any objection to the recovery upon that specific ground, or demanded a bond. Judgment was rendered for the plaintiff, from which the defendants appealed.

*Beebe, Dean and Donohue*, for the appellants.

*G. N. Reynolds*, for the respondent.

HILTON, J.—As a general rule, this court will, upon appeals from inferior courts, disregard all objections not taken at the trial, nor distinctly specified in the notice of appeal; but we do not consider this case one to which this rule should be applied. Here the drafts, or orders sued on, were negotiable; and, it appearing at the trial that they were lost, parol evidence was given of their contents. Under such circumstances, the loss being distinctly proved, to entitle the plaintiff to recover, he was required to execute a bond to the defendants, in a penalty at least double the amount of the drafts or orders, with two sureties, to be approved by the court in which the trial was had, conditioned to indemnify, &c., against all claims by any other person on account of such drafts, and against all costs and expenses by reason of such claim. 2 R. S. 406, § 76.

The giving of this bond was a *pre-requisite* to any recovery against the defendants upon the drafts, and the return not showing affirmatively that any such bond was given, the judgment must therefore be reversed.

Judgment reversed.

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Flint v. Schomberg.

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DAVID B. FLINT and WILLIAM H. KENT v. THEODORE G. SCHOMBERG.

The plaintiffs, for a commission of two and a half per cent., which was paid to them by the owners of a promissory note, made payable to the maker's own order, and indorsed by him in blank, indorsed the note to enable the holders to get it discounted. It was discounted by a bank, and, having been protested for non-payment, it was paid by the plaintiffs to the bank, and taken up by them.

*Held*, that by paying and taking up the note, the plaintiffs became subrogated to the rights of the bank, and were not subject to equities between the maker and the parties to whom he delivered the note, and consequently that a claim of the maker against such parties was no defence to an action upon the note by the plaintiffs.

The indorsement of the note by the plaintiffs for a commission of two and a half per cent., paid to them by the holders, was not a usurious transaction.

APPEAL from an order at special term denying a motion for a commission. This was an action upon a promissory note, made by the defendant, payable to his own order, indorsed by him, and held by the plaintiffs. From the answer and moving affidavit of the defendant, it appeared that the note was made by him and delivered to the firm of James Porter & Co. That James Porter & Co. procured the plaintiffs to indorse it, for the purpose of enabling them to raise money thereon, and they paid for the endorsement a commission of two and a half per cent. on the face of the note. It was then discounted at bank. When it became due it was protested for non-payment, and was taken up by the plaintiffs from bank after protest. The defendant set up a counter-claim against Porter & Co., and moved for a commission to examine witnesses abroad, to prove the facts out of which the alleged counter-claim arose. The motion was denied at special term, on the ground that the plaintiffs were entitled to be subrogated to the rights of the bank, and were therefore to be regarded as *bona fide* holders for value, and not subject to equities between the original parties. The defendant appealed.

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Flint v. Schomberg.

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*J. N. Balesier*, for the appellant. After careful examination, I have not been able to find any authority bearing directly upon this case. But upon principle it is apparent that the plaintiffs took the note subject to all the equities existing against Porter & Co.

*First.* The plaintiffs are not *bona fide* holders, as they took the note after it became due.

*Second.* The fact that the plaintiffs indorsed the note for *hire*, and afterwards, in consequence of such indorsement, were compelled to take it up, does not constitute them *bona fide* holders, nor entitle them to subrogation; for the note was never negotiated by or through them, and there is no privity of contract between them and the previous holders.

*Third.* The plaintiffs could not recover against Porter & Co. because their indorsement was for a usurious consideration. The usury would therefore avoid the note as between Schomberg and the plaintiffs. *Sleel v. Whipple*, 21 Wend. 103.

*Benedict, Burr & Benedict*, for the respondents. The facts set up in the defendant's affidavit are no defence to the action.

The plaintiffs indorsed the note before maturity. It must, then, have been transferred to them, and they must have been the holders of the note. In what way they became the holders of it can make no difference. Their payment of it as indorsers gives them the absolute right to recover the amount of all precedent parties. Their contract, when they indorsed the note, was, that they should have this right of recourse.

But if the contrary view is taken, and the statement of the defendant's affidavit is true, that "they took the note a week after it fell due," still the plaintiffs' right to recover is undoubted. They would, in that case, be subrogated to the rights of the bank, who had discounted it, and held it when it became due. *Chitty on Bills*, 141, 142; *Williams v. Mathews*, 3 Cowen, 260; *Edwards on Bills*, 258; *Ketchum v. Barber*, 4 Hill, 234.

**DALY, FIRST JUDGE.**—So far as the facts can be collected

## Flint v. Schomberg.

from the affidavit of the defendant, it would appear that he made the note to the order of Porter & Co.; that Porter & Co. procured the plaintiffs to indorse it for a commission of two and a half per cent., to enable them to get it discounted; that it was discounted by a bank, and that the maker and payees having failed to pay it, the plaintiffs, after it was protested, paid it to the bank, and now bring action upon it against the defendant, the maker.

Upon such a state of facts, it is, I think, very clear, that the claim which it is averred in the answer that the maker has, against the payees, is no defence to the action. The plaintiffs, having paid the note, were subrogated to the rights of the bank. The bank, when the note fell due, were holders for value. There could be no doubt but that they could recover against the maker, and that his claim against the payees would be no defence to their action, and it is equally no defence to the plaintiffs' action, they having succeeded to whatever rights the bank had, as holders, when the note fell due.

The transaction between Porter & Co., the payees and the plaintiffs, is wholly immaterial in this action. If the plaintiffs had loaned Porter & Co. the money on the note, the case of *Steele v. Whipple* (21 Wend. 103) might have been in point, (*Ketchum v. Barber*, 4 Hill, 234); but the fact that they put their name upon the note for a commission of two and a half per cent. to enable Porter & Co. to get it discounted by somebody else, which would appear to have been the transaction, was not, as between them and Porter & Co., a usurious agreement. The motion for a commission was therefore properly denied, as it appeared by the defendant's affidavit that he had no available defence against the plaintiffs' action.

Order of special term affirmed.

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Hatfield v. Secor.

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**MARY HATFIELD, executrix of William B. Hatfield, v. JERONIMUS A. SECOR and JOHN D. SECOR.**

No appeal lies from an order at special term refusing leave to amend, unless a certificate of the judge making the order is obtained, pursuant to rule of this court, adopted 22d March, 1851. Applications for leave to amend are in all cases addressed to the favor of the court.

APPEAL by defendants from an order at special term, denying a motion for leave to amend an answer. This action was brought to recover a sum of money alleged to have been loaned to the defendants by William B. Hatfield, in his lifetime. The original answer denied the loan of money, and averred that William B. Hatfield agreed to enter into a partnership with the defendants, and that the money so advanced to them was advanced as part of his contribution to the capital stock of the partnership, and that he failed to complete his agreement, to the defendants' damage \$20,000. After the cause was upon the day calendar, D. & T. McMahon were substituted as defendants' attorneys, and moved at special term to amend the answer, by striking out the allegation as to damage, and averring that the money was a part of partnership assets belonging to the three, and liable for the debts of the firm; that there were a great number of debts still due and unpaid, and that they were always ready and willing to account to said Hatfield, or his representative, for his interest in the firm, in a proper action brought for that purpose. The motion was denied, and the defendant appealed.

*D. McMahon*, for the appellants.

I. The judge erred in treating the allowance of amendment as a matter of discretion. It is strictly a matter of right. When the court grants an amendment, the order is not, *per se*, appealable. But the refusal to grant an amendment, where proper, is appealable. *Travis v. Barger*, 24 Barb. 626; Code, § 349, sub. 8; § 173; 2 Rev. Stat. 424, § 2.

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II. The judge erred also in determining upon the merits of the amendment on the motion. That can only be done by the trial of the cause in the mode pointed out by law.

III. Amendments have been granted even after verdict—when the effect of the amendment is to set aside the verdict in a very meritorious case, and to set up a perfect bar to the action. A remarkable case of the admission of that right, which was not then allowed, is reported in *Travis v. Barger* (24 Barb. 626, 627). It is rather late at the present day, after the passage of the Code, to argue a strict construction of the power of amendment. *Burnap v. Halloran*, 1 Code Rep. 51; *Chapman v. Webb*, 1 Code Rep. N. S. 388; *Bradley v. Hover*, 7 How. Pr. Rep. 294; *Spalding v. Spalding*, 1 Code R. 64.

IV. There was no pretence of laches in moving for this amendment. *Corning v. Corning*, Code Rep. N. S. 351; *same case on appeal*, 2 Selden, 97; *Bradley v. Hover*, 7 Pr. Rep. 294.

*H. B. Cowles*, for the respondent.

BRADY, J.—Amendments are in all cases matter of favor, and not of strict right (Graham's Pr. 669, 2d ed.), and being addressed to the discretion of the court, no appeal can be taken from the order made on applications therefor (*St. John v. West*, 4 How. Prac. Rep. 331; *Seeley v. Chittenden*, 10 Barb. 303; *Tullman v. Hinman*, 10 How. 90; *Tracy v. New York Steam Faucet Co.*, 1 E. D. Smith R. 357, citing and approving *St. John v. West*, *supra*), unless the certificate of the presiding judge at special term is procured, as provided by rule of this court of March 22d, 1851; which was not done in this case.

Appeal from the order of the special term dismissed, with costs.

## MARY LEE v. ELIZA SCHMIDT.

Upon appeal from the Marine or District Court, the appellant must distinctly specify in his notice of appeal the errors alleged, whether in the process, pleadings, proceedings at the trial, or in giving judgment, that his adversary, the justice, and also this court, may be fully apprised of the matter intended to be the subject of review.

Where the errors are not distinctly pointed out in the notice, or where the notice states generally, as a ground of appeal, that the judgment is against law and evidence, specific objections will not be heard on the argument, but the judgment will be summarily affirmed.

A statement in the notice, that the judgment is against the weight of evidence, is not sufficient to justify its review as being contrary to evidence, or against evidence, each being a distinct ground of error, and, if relied on, must be stated.

A judgment will not be reversed where the cause was tried upon the assumption of the existence of a fact which was not proven, but which was incumbent on the plaintiff to have shown, and might have been established if objection had been taken at the trial.

Nor will a judgment be reversed for defect of proof, when, if objection had been taken at the trial, it could or might have been obviated.

In an action to recover damages for the unlawful detention and conversion of certain personal property, it did not appear by the return that any evidence whatever was offered tending to show that the defendant detained or converted the property. No objection to this defect of proof appeared to have been taken at the trial.

*Held*—1. That the defendant would not be permitted to present such an objection upon the appeal:

2. That, as the notice of appeal only alleged, as ground for reversal, that the judgment was "contrary to the clear and decided weight of evidence," he must be confined to the objection stated.

**APPEAL** from a judgment rendered by Justice William B. Meech, of the Third District Court.

The return was very brief, and in these words: "That the action was commenced by summons; the parties appeared—the plaintiff in person and the defendant by counsel. The complaint was for \$45 damages against the defendant, for keeping and detaining a silk dress. The answer was a general denial. The plaintiff offered Lucy Moore as a witness to prove the value of the dress, and that the defendant detained and kept the same.

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Lee v. Schmidt.

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The defendant objected to the witness on the ground of incompetency, and that the witness had no knowledge of the value of the dress. The objection was overruled, and the defendant excepted. The witness then testified that she had previously seen the dress on the plaintiff, and it was worth \$45. The plaintiff here rested, whereupon the witness was cross-examined. She said she had never sold or dealt in silks, and did not know its value, but had bought several dresses, probably four in all, and she judged by that. The testimony was again objected to by the defendant, on the ground of the incompetency of the witness. The objection was overruled, defendant excepting. The case was here closed, and judgment was given in favor of the plaintiff for the amount claimed."

The return seemed to be in the handwriting of the defendant's attorney, and the justice, before signing, added that "This return is made subject to legal amendments."

The defendant appealed, and in the notice stated, as the only ground, "that the judgment rendered by the court is contrary to the clear and decided weight of the evidence produced on the trial of this action."

*P. F. Smith*, for appellant, upon the argument, urged as grounds for reversal, 1. That there was no proof of demand made of the defendant for the dress; 2. That the witness had no knowledge of its value (*Ely v. O'Leary*, 2 E. D. Smith, 355); 3. That the dress was not proven to have been in the defendant's possession, nor was it shown to have been kept or detained by her (*Davidson v. Donadi*, 2 E. D. Smith, 121); 4. The judgment is against the weight of evidence; 5. It is without evidence to support it (*Howard v. Brown*, 2 E. D. Smith, 247).

*Burger and House*, for respondent. 1. No objection was taken, on the trial, to the insufficiency of the evidence; 2. It is apparent that the return does not contain all the evidence, and the party asking for reversal should be required to furnish a complete return, otherwise the judgment should be affirmed.

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*McCarthy v. Kelly*, 2 Sandf. 637; *Relshaw v. Colie*, 3 Code Rep. 184; *Klinck v. Doreest*, ibid. 185.

**DALY, FIRST JUDGE.**—The complaint in this action was for wrongfully detaining a silk dress of the plaintiff, of the value of \$45, which the defendant answered by a general denial. Upon this issue the parties went to trial, and all that appears by the return is, that the plaintiff called a witness, who testified that she had seen the dress upon the person of the plaintiff, that she had bought several dresses, and that in her judgment the dress was worth \$45. Before she testified to the value of the dress, the defendant objected to her competency to testify upon the question of value, which objection was overruled by the justice; and when she had finished her testimony, the defendant further objected to its sufficiency. It would seem that, upon this evidence, which merely proved the plaintiff's title to the property and its value, the plaintiff had judgment. Upon the most material point in the case—the possession of the dress by the defendant and its wrongful detention—it does not appear, by the return, that any evidence was given. This was put in issue by the pleadings; and if the return sets forth all the evidence, then it would seem that neither the plaintiff nor the justice appear to have thought it of any consequence to have evidence upon that point, nor does the defendant appear to have thought it necessary to draw the attention of the court to the want of any evidence of the possession and wrongful detention of the property by the defendant, or to ask the justice for a nonsuit, or to dismiss the complaint upon that ground. He does not even take the objection in his notice of appeal, but presents it now for the first time. His notice merely specifies, as the ground of appeal, that the judgment is contrary to the clear and decided weight of the evidence.

We have held that the appellant must specify in his notice the grounds of his appeal, and the error on which he relies, that his adversary, as well as the justice, may be fairly apprised of the ground that is to be taken before the appellate court for the

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reversal of the judgment. It was held, in *Williams v. Cunningham*, (2 Sandf. 632) under a provision in the Code of 1848, § 303, which required the grounds upon which the appeal was founded to be stated in the affidavit, "that the appellant must put his finger on the point relied upon, and distinctly inform his adversary on what grounds he alleges that there is error in the judgment." Such a construction was then less necessary than now, as the appellant was then required to serve upon the respondent and upon the justice an affidavit stating the substance of the testimony and proceedings in the court below, for which, by the amended Code of 1852, § 353, a notice, "stating the grounds upon which the appeal is founded," was substituted, so that all that the justice now has to guide him, in making his return, is what is stated in the notice. We have, therefore, held that it must specify with reasonable certainty the alleged error or errors, whether in the process, the pleadings, the proceedings at the trial, or in the giving of judgment, that the justice may omit nothing in his return essential or necessary to bring up the matter fairly for review, or, in the event of his neglecting to do so, that the respondent may have an opportunity, before the appeal is brought to a hearing, of applying to the court for an order that the justice return specifically in respect to any matter which may be essential to a full and fair review of the case. We have consequently refused to hear specific objections and summarily affirmed judgments, where the only ground stated in the notice was, that the judgment was against both law and evidence; and in other cases refused to reverse for errors not specifically pointed out in the notice of appeal. The same view of the requisites of the notice of appeal, and of the right and duty of the court to disregard errors not specifically pointed out in it as grounds of appeal, has also been taken by the judges of the seventh district of the Supreme Court, in the decision rendered by the general term of that district, in *Derby v. Hannin* (5 Abbott's R. 150).

The ground of appeal specified in the present case is, that the judgment "is contrary to the clear and decided weight of the evidence," which is a ground very different from the one upon

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which we are now asked to reverse the judgment. The inquiry as to the weight of evidence is one that arises where there has been conflicting evidence upon a disputed and controlling point in the case; and the objection, that the verdict or judgment is against the weight of it, presupposes that, if the testimony upon one side is weighed against the testimony upon the other, the preponderance against the finding of the jury or judge will be so great, convincing, or overwhelming as to warrant the conviction that the verdict or judgment must have been the result of prejudice, passion, partiality, or corruption. No such question could arise in this case, for there was no contradiction in the testimony submitted by the plaintiff, and the defendant called no witnesses. The ground upon which the appellant founds her appeal is, that upon the most material issue in the case—the conversion of the property by the defendant—there was no evidence at all; and this ground is not specified in her notice. It is not that the testimony offered by the plaintiff in support of her case was outweighed by the testimony adduced on the part of the defendant, but that the plaintiff, upon her own evidence, failed to show any cause of action against the defendant. A verdict or judgment may be erroneous for want of evidence to support it, or it may be against evidence, as where there is no conflict in the testimony as to the facts, and the conclusion founded upon them is erroneous in law, or where there is conflict among the witnesses, or in the testimony offered, the finding may, as above stated, be against the weight of evidence. These are all distinct grounds of error, for either of which the judgment may be reversed, and if any one is relied upon, it must be stated in the notice of appeal. To give notice, therefore, that the ground of appeal is, that the judgment is contrary to the weight of evidence, when the error upon which the appellant means to rely is, that the plaintiff failed *prima facie* to establish any cause of action, would have the effect to mislead, rather than to apprise the respondent and the justice of the real ground the defendant meant to take before the appellate court for the reversal of the judgment.

It is evident that it was not through ignorance or inability

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that the defendant's attorney omitted to express in his notice the ground upon which he meant to rely. With commendable brevity it is set forth in his written points in a single sentence—that it did not appear by the testimony that the dress was in possession of, or detained by, the defendant; and if, with equal conciseness, he had stated this objection in his notice, the justice would have been apprised of what would be material in his return, and the respondent of what he would be required to meet.

For all that we know, there may have been evidence of the detention of the dress by the defendant, or that point may have been conceded or admitted by the parties upon the trial. It is stated in the respondent's points that the return does not contain all the evidence; and it is a matter of constant experience in this court, that justices do not return fully the evidence given before them, and that their returns, in the great majority of cases, are very defective. It has been especially so in the returns of the justice by whom this return is made. He states in his return the objection made by the defendant to the sufficiency of Lucy Moore as a competent witness, to show the value of the dress, after her preliminary examination, as to her general knowledge of the value of such articles; and the further objection at the close of the testimony, that the plaintiff had not proved the value of the dress. He may have supposed, from this notice, that that was the only question that was to come under review; as the only objection made in the court below, to the plaintiff's right to recover, was the want of sufficient proof of value; and that, when he had given the whole of the testimony upon that point, he had returned all that was material.

It would seem very strange that the plaintiff should give no evidence of the conversion of the dress by the defendant, which was the most essential part of her case; that the justice should give judgment without requiring it, and that the defendant should raise no objection to the want of such proof. In *Ford v. Moore* (20 Wend. 210), the court refused to set aside a verdict for the want of sufficient proof of a fact, which it was incumbent

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Davis v. The New York and Erie Railroad Co.

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for the plaintiff to show, when the cause appeared to have been tried upon the assumption of the existence of the fact; and it has been repeatedly held that a judgment will not be reversed for a defect of proof, when, if the objection had been taken at the trial, it could or might have been obviated. *Doane v. Eddy*, 16 Wend. 521; *Lawrence v. Barker*, 5 ibid. 301; *Safford v. Stevens*, 2 ibid. 158; *Henry v. Cuyler*, 17 Johns. 473; *Gelston v. Hoyt*, 13 ibid. 576; *Elsey v. Metcalf*, 1 Denio, 323; *Luckey v. Frantze*, 1 E. D. Smith, 47; *Heim v. Wolf*, ibid. 71; *Stern v. Drinker*, 2 ibid. 401.

We might be justified in saying, that it would seem by this return, as in *Ford v. Moore, supra*, that the cause was tried upon the assumption of the detention of the dress by the defendant; or that, if the objection had been taken at the trial, it might have been obviated; but it is sufficient to rest our decision upon the ground that the appellant has not specified, in her notice of appeal, the error for which she asks us to reverse the judgment; and the way in which this return is made up by the justice shows the propriety of requiring a strict compliance with the provisions of the Code in all cases, and of refusing to hear any objection to a judgment which is not clearly indicated in the notice of appeal.

Judgment affirmed.

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#### WILLIAM P. DAVIS v. THE NEW YORK AND ERIE RAILROAD COMPANY.

Upon appeal from a district court, the appellant is limited to the grounds of appeal stated in his notice. Where none are stated, the judgment will be affirmed. It seems, that where a horse dies through the neglect of a common carrier, to whom he has been delivered for transportation, the damages for such neglect consist of the value of the horse at the place of delivery, at the time he should have been delivered.

APPEAL by plaintiff from a judgment of the First District Court. The facts are fully stated in the opinion of the court.

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Hope v. Bogart.

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*R. A. Watkinson*, for the appellant.

*Eaton and Davis*, for the respondents.

HILTON, J.—In December, 1855, the plaintiff delivered to the defendants, at Bergen, New Jersey, six horses, to be transported on the defendants' railroad to Alden, New York. Only five horses were delivered, the other having died in the car, and while in course of transportation. The plaintiff claims that the death resulted from the negligence of the defendants, and this action is brought to recover damages for this neglect, which would consist of the value of the horse at the place of delivery, and at the time he should have been delivered. 2 Parsons on Contracts, 468; Sedgwick on Meas. of Damages, 855; *Wibert v. N. Y. & Erie R. R. Co.*, 19 Barb. 36.

The justice, after hearing the evidence on the part of the plaintiff, dismissed the complaint, and gave as a reason that no facts were proved sufficient to enable him to ascertain the amount of damage.

The notice of appeal, on the part of the plaintiff, and which accompanies the return, does not state any ground upon which the appeal is founded. Code, § 353. We have repeatedly held that, in reviewing upon appeal the proceedings of a justice, the appellant is limited to the grounds of appeal stated in the notice. *Lee v. Schmidt*, *ante*, p. 537.

In this case, none being stated, the judgment is affirmed.

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THOMAS HOPE and others *v.* JOHN II. BOGART.

No acknowledgment or promise is sufficient evidence of a new or continuing contract, to take a case out of the operation of the statute of limitations, unless contained in some writing signed by the party to be charged thereby.

## Hope v. Bogart.

The effect of the enactment of the provision in the Code of 1849, requiring such promise to be in writing, is to establish a new rule of evidence for all cases, where the action is brought after the period limited by statute.

**APPEAL** from a judgment of the Sixth District Court. The facts are fully stated in the opinion of the court.

*J. B. Staples*, for the appellant.

*G. L. Walker*, for the respondents.

**HILTON**, J.—The plaintiffs brought this action upon an account for goods sold and delivered by them to the defendant, between January 5th and October 9th, 1850. The defence interposed was, that the cause of action had not accrued at any time within six years previous to July 9th, 1857, the day this suit was commenced. Upon the trial, the plaintiffs proved a parol promise made by the defendant in 1853, to pay the account then rendered. The defendant not only objected to this proof being admitted, but also moved to dismiss the complaint, upon the ground that the statute of limitations had taken effect upon the claim before the suit was brought, and that no verbal promise could continue or revive the debt. The evidence was admitted, the motion denied, and judgment rendered in favor of the plaintiffs. The defendant appeals.

By the statutes in force at the time this debt was created, an action for its recovery could only be commenced within six years after the cause of action accrued: and no acknowledgment or promise could be sufficient evidence of a new or *continuing* contract, to take the case out of the operation of this provision, unless the same was contained in some writing *signed* by the party to be charged thereby. Code of 1849, §§ 74, 91, 110.

The obvious intention of this enactment was, to require that every such promise or acknowledgment thereafter made, to be valid, should be in "writing, and signed by the party to be charged thereby." A new rule of evidence is thus established for all cases, where the action is brought after the period

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thus limited. *Esselstyn v. Weeks*, 2 Kernan, 635; *Wadsworth v. Thomas*, 7 Barb. 445. These provisions of law are still in force, and the evidence admitted was clearly insufficient to charge the defendant with a demand barred by statute.

Judgment reversed.

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#### ANDREW KENNEDY v. JOSEPH SHILTON.

An order of reference is not appealable when made in a case which the court is authorized to refer, and when it rests in the discretion of the court to grant or withhold the reference.

In an action to dissolve a partnership, and procure an accounting between the partners, an averment in the answer, that on a specified day the accounts were settled and adjusted between the partners, and they had not taken any new contracts since, does not raise an issue which makes it improper to send the cause to a referee. Conceding the allegation to be true, as the partnership did not then terminate, the plaintiff is entitled to an accounting from the time specified.

APPEAL by defendant from an order of reference. The facts are stated in the opinion of the court.

*Knox & Mason*, for the appellant.

I. The action is not referable, under the Code, without the consent of parties. Code, § 271. 1. The trial of the issues of fact, in this action, does not require the examination of a long account on either side.

The only issues of fact (in addition to those on the decision of which depends the question whether or not the plaintiff is entitled to an injunction and receiver) are :

- a. Whether they were general copartners in trade?
- b. Whether property was bought in the individual name of the defendant, with funds of the firm?
- c. Whether the books were kept by the defendant?
- d. Whether the copartnership profits amounted to \$30,000?
- e. Whether the plaintiff advanced \$7,000?

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f. Whether the defendant has refused to allow the plaintiff to examine the books? Of these, the 4th and 5th issues are met by the allegations of the answer of a settlement of the account. That issue must be tried before it can be determined whether the account is to be taken. *Graham v. Golding*, 7 How. P. R. 260; *Keeler v. Poughkeepsie Plankroad Co.*, 10 ibid. 11. 2. The taking and stating of an account is not necessary for the information of the court before judgment. Code, § 271, subd. 2. 3. It may become necessary, *after* judgment, for the purpose of carrying it into effect; this necessarily involves the judgment of the court upon the issues *before* the account is taken.

II. The notice of motion, in this cause, was for a reference of the cause, to "hear, try and decide the same." The order was, that "the issues be referred, to hear, try and decide the same." Those issues involve the questions stated under the 1st point, and also whether the defendant, on a final hearing, should be enjoined from disposing of property standing in his individual name; and also the question whether, on a final judgment, the receiver should dispose of the property. Such issues clearly are not referable under the Code, excepting by consent. It is not a reference to take and state an account.

III. The question of an accounting and the form and manner of an account, if allowed, depend entirely upon the judgment of the court on the issues as framed. These issues, which are to be first determined by the court, are the issues referred to the referee. The regular and proper order of the case is reversed. The taking of the account is not so necessarily connected with the trial of the issues as to bring this case within the class referred to in *Miller v. Kennedy*, 11 How. 173.

IV. If the referee proceeds to try the issues as directed by the order, and nothing else, and he can do nothing else under the terms of the order, the case is taken out of all of the several classes in which the court has power to order a reference without consent.

V. The only proper form of an order of reference (if such an order could be made at all) would be, to try the issues first.

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and, if the defendant was liable to account, then to take an account. *Palmer v. Palmer*, 18 How. P. R. 365; *Vanzani v. Cobb*, 10 ibid. 349.

VI. But the defendant contends that the mere possibility of an account being necessary, under a certain state of facts, will not carry the whole case to a reference. This is one of the cases provided for by subdivision 2 of Code, section 271, which makes a reference proper *after* judgment for the purpose of carrying it into effect. *Graham v. Golding*, 7 How. P. R. 260.

*Barker and Whitehead*, for the respondent.

1. No appeal lies from an order granting a reference. *Gray v. Fox*, 1 Code Rep. N. S. 334; *Bryan v. Brennan*, 7 How. Pr. R. 359; *Dean v. Empire Mu. Ins. Co.* 9 ibid. 69. 2. An order of reference affects no substantial right. A substantial right is a fixed, determined right, independent of the discretion of the court. An order of reference is a mere matter of practice, within the discretion of the court. *Tallman v. Hinman*, 10 Pr. Rep. 90. 3. This is a proper order within the jurisdiction of the court, and properly made. Code of 1855, § 271, sub. 1. It appears by the pleadings that the trial will require the examination of a long account. 4. The account is the only thing to be taken, the partnership being admitted. 5. The allegations of investment of joint funds in real estate are made merely for purpose of injunction. 6. An issue which involves a long account may be referred, notwithstanding the action is founded on fraud. *Sheldon v. Wood*, 1 Code Rep. N. S. 118, *per* Mason, J.; see *Graham v. Golding*, 7 Pr. R. 260.

HILTON, J.—In March, 1850, as appears by the complaint, the plaintiff and defendant became general partners in contracting as masons and builders, and which partnership the plaintiff now asks to have dissolved for reasons stated, and that an accounting shall be had and taken of the joint affairs and business, under the direction of the court. The defendant having answered, the court, at special term, ordered that the issues in the

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action be referred to a referee, to hear and determine the same. From this order the defendant appeals, and insists, that because in his answer he alleges, "that at or about the first day of January, 1852, the copartnership accounts of Kennedy & Shilton, as between the two partners, were adjusted and settled, and since that they have not taken any new contracts," the issue thus presented must be first tried and determined before an accounting can be ordered, or a reference had for the purpose of taking the account between the partners.

This, however, is a mistaken view of the effect of such an averment, because, conceding the fact to be as alleged, still the plaintiff would be entitled to have an accounting ordered from the time the accounts were so settled and adjusted.

The case is clearly one which the court, at special term, was authorized to refer; and it rested in the discretion of the court to grant or withhold the reference. Code, § 271. Such an order does not involve the merits of the action, nor affect a substantial right, and there is no authority for its review upon appeal, when it is made in a case like the present. Code, § 349; *Dean v. Empire State Mutual Ins. Co.*, 9 How. Prac. R. 69; *Bryan v. Brennan*, 7 ibid. 359; *Tullman v. Hinman*, 10 ibid. 89.

Appeal dismissed.

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#### SOLOMON M. BAKER v. PHILIP NUSSBAUM.

In an action upon a draft, or check, for \$3,768, the defendant, in his answer, alleged that the check was given in payment of certain property purchased by him from the plaintiff, and warranted by the latter to be of a certain quality; averred a breach of the warranty, and claimed to recoup \$500 damages therefor. *Held*—a proper case for an order, under § 244 of the Code, directing the defendant to satisfy part of plaintiff's claim admitted to be due.

Rule 35 of the court, allowing twenty days for the payment of costs, or the performance of any condition imposed by an order, has no application to such an order, which may be enforced either as a judgment or as a provisional remedy.

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APPEAL from an order at special term, directing the satisfaction of part of plaintiff's claim. The action was upon a draft or check for \$8,768. The answer averred that the check was given in payment for certain hogs, which were warranted to be of good quality; that they were in reality of less value than represented, and claimed to recoup as set-off \$500 damages for the breach of warranty. The plaintiff moved, at special term, under § 244 of the Code, for an order requiring the defendant to satisfy the claim of the plaintiff to the extent of \$3,268.75, and interest. The motion was granted, and the defendant appealed.

*D. P. Wheden*, for the appellant.

*P. Preponi and Stanley*, for the respondent.

BRADY, J.—The order appealed from was properly made. The defendant admitted, by his answer, that the sum directed to be paid by the order was due to the plaintiff. No other construction can properly be given to the answer. The 35th rule of the court, relied on by the defendant, has no application to such orders. They may be enforced as a judgment or provisional remedy. § 244.

Order appealed from affirmed, with costs.

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#### WILLIAM H. MERRITT v. MARTIN THOMPSON.

Bail are entitled to be discharged upon the death of their principal, and they have, themselves, an undoubted right to make the motion for such discharge.

There is no arbitrary or positive rule in respect to the time when the presumption of death may be drawn from the continued absence of a person. It is not necessary that seven years or any specific period should elapse, to lay the foundation for such presumption, but it may be drawn whenever the facts of the case will warrant it.

If the party, whose death is in question, went to sea, and nothing has been heard

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of the vessel in which he left, or of those who went in her, the presumption, after a sufficient length of time has expired, will be that the vessel was lost, and that all on board of her perished.

What is a sufficient length of time to create such a presumption considered, and the cases upon the question collated and examined.

T. having departed upon a voyage, the ordinary limit of which was four months, and seventeen months having expired, and nothing having been heard of the vessel in which he sailed, or of those who were in her, and the period of time being much more than sufficient to have heard from all the commercial ports of the world—

*Held*, that it must be presumed that the vessel was lost, and that those on board of her, including T., had perished; and therefore his bail were entitled to be discharged.

The presumption of death in such a case does not rest upon the fact that the party has been absent and unheard of for such length of time alone, but upon the weightier circumstance that the vessel has not been heard from.

The question in such a case is not, whether it is not possible that the party ~~may~~ be alive, but whether these circumstances do not present so strong a probability of his death that a court of justice should act thereon. Presumptions founded in a reasonable probability must prevail against mere possibilities. Otherwise the conclusion could never be arrived at, that a man was dead until the natural limit of human life had been reached.

Formal and preliminary objections, not involving the merits of a motion, will not be considered upon appeal, unless it affirmatively appears that they were taken and overruled, when the motion was brought on for a hearing.

APPEAL from an order at special term, discharging the defendant's bail. This was an application by the defendant's bail for their discharge, upon the ground that the defendant was dead. It was shown by an affidavit, which was not controverted; that the defendant was master of the ship Helena. That he sailed with that vessel from this port in November, 1854, on a voyage to Melbourne, Australia. That, after arriving at Melbourne, he sailed from that port to various ports in the Chinese seas, and was, in the summer of 1856, at Hong Kong, in China. That a letter was received from him at that place, dated June 7, 1856, announcing his intention to go from there to Amoy and Swatoo to load with Chinese emigrants for Havana. That intelligence was received through the newspapers, announcing the sailing of the Helena from Swatoo for Havana on the 27th of Aug., 1856, but, that from that time to the present, a period of seventeen

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months, nothing has been heard from the vessel or of the defendant. That the letter written by the defendant from Hong Kong is the last intelligence received of him by his friends and acquaintances, and the account in the newspapers, of the sailing of the vessel from Swatoo for Havana, the last information received of her. That the ordinary length of passage for a vessel, of the class of the *Helena*, from Swatoo to Havana, is about four months, and that the seventeen months that have elapsed is more than double the time necessary to hear at this port from every port in the known world. That during that time intelligence has been received many times from all the commercial ports of the world, but no tidings have been received of the vessel, of the defendant, or of any one on board of her. That letters of administration of the estate of the defendant have been granted to his wife and presumed widow, and to which is added the belief of the party deposing to these facts, that the defendant is dead.

*F. H. Dykers*, on the affidavit, moved that the bail be discharged, and an exoneratur entered upon the bail piece; which motion was granted by the judge holding the special term, and an order entered accordingly.

From the order the plaintiff appealed.

*C. A. Rapallo*, for the appellant.

*F. H. Dykers*, for the respondent.

**DALY, FIRST JUDGE.**—There is nothing in the notice of motion showing that the application was made by the defendant through his attorney, and unless that fact appears upon the face of the papers, we will assume, upon the appeal, that it was made by the bail or on their behalf, they having, undoubtedly, the right to make it.

The objection, that the affidavit does not state what the bail bond or undertaking was, nor who were bail, is a mere formal and preliminary objection, not involving the merits of the motion, and we must be satisfied that that objection was taken below

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when the motion was brought on for a hearing, or we will not, upon appeal, reverse the order for that reason. We will assume that, if the objection had then been made, the defect, if it be one, would have been instantly remedied.

If the principal is dead, the bail are entitled to be discharged. This is expressly provided for by the Code, § 191, and was always the law. *Rawlinson v. Gunston*, 6 T. R. 284; M. Jones, 136; 2 Cromp. Pr. 88; 2 Sell 55; Petersdorf on Bail, 389.

There is no arbitrary or positive rule in respect to the time when the presumption of death may be drawn. It is said that if a person goes abroad, and is not heard from for *seven* years, he is presumed to be dead, but this limitation is merely adopted by analogy from the statutes of 1 Jac. I, c. 11, § 2, and 19 Car. II, c. 6, § 2, the former of which exempted a party marrying from the penalties of bigamy, where the husband or wife had been absent for seven years without being heard from, and the latter of which, in respect to the lives of persons, in leases, declared that if absent for more than seven years they should be deemed naturally dead. But it is not necessary that seven years, or any specific period, should elapse to lay the foundation for the presumption of death, but it may be drawn whenever the facts of the case will warrant it. *Houseman v. Thornton*, 1 Holt N. P. C. 242; *The King v. The Inhabitants of Harborne*, 2 A. & E. 540; 1 Park on Insurance, 105, 106; Best on Presumptions, 59, 191, 238.

If the party whose death is in question went to sea, and nothing has been heard of the vessel in which he left or of those who went in her, the presumption, after a sufficient length of time has ensued, will be that the vessel was lost, and that all on board of her perished. *Green v. Brown*, 2 Strange, 1199; *Koster v. Innes*, Ry. & Mo. 381; 1 Park on Insurance, 105, 106, 107; Best on Presumptions, 238. The length of time that must elapse to create such a presumption will depend upon the nature of the voyage and of the navigation, and a court or a jury will be guided by the circumstances that are laid before them, in determining whether such a presumption is warrantable or not. In

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*Houseman v. Thornton, supra*, the vessel left Havana on a voyage for Antwerp, and not having been heard of for nine months, the court held that it was to be presumed that she was lost. In *Watson v. King* (1 Starkie, 121), one Maxwell sailed from Jamaica on the 1st of March, 1814, in a vessel that formed one of a convoy. On the 9th of that month the vessel parted from the convoy in thick weather, after which, on the 20th, there was a heavy gale. On the trial, which appears to have been about a year afterwards, the vessel had not been heard of, and the point in the case being whether a power of attorney, by virtue of which property of Maxwell had been conveyed to the defendant on the 8th June, 1814, about three months after the sailing of the vessel, was to be deemed revoked, upon the assumption that Maxwell was then dead, Lord Ellenborough instructed the jury that it might be assumed that Maxwell was dead, but that it was for their consideration whether he was dead on the 8th of June, 1814, and the jury found for the plaintiff, assuming that Maxwell was dead on that day; and in *Twemlow v. Oswin* (2. Camp. 85), the vessel sailed from Liverpool for Miremachi in April, 1807, and at the time of the trial, which was about two years afterwards, had not been heard of. As in the preceding case, Chief Justice Mansfield left it to the jury to say whether the vessel was lost, and the jury found that it was.

In the case before us, neither the defendant nor the vessel in which it is to be assumed that he sailed from Swatoo, in China, upon a voyage to the Havana, has been heard of for a period of seventeen months. The usual length of such a voyage is four months. It was shown, by the affidavit, that during this long interval of time, intelligence has reached this city from every port of the commercial world, but no tidings have been received of the defendant or of the vessel. It is stated, further, that more than double the time necessary has elapsed to hear from every port of the world. This case is quite as strong as the cases above referred to, and I think the judge below was justified in assuming that the defendant was dead. The presumption of his death does not rest upon the fact that he had not been heard of

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for seventeen months, but upon the weightier circumstance that the vessel has not been heard of. *King v. Paddock*, 18 John. 148. It has been suggested that she may have been lost or destroyed by pirates and the defendant have survived; that, considering the dangerous nature of the navigation in which he was engaged, and the character of the islands of the Pacific where he may have landed, it is not unreasonable to suppose that he may still be living.

The supposition that a man may be living is not unreasonable, where nothing is known to the contrary, until the natural limit of human life has been passed. It is possible that the defendant may be alive, but that would be possible fifty years hence. The question is not whether it is possible that he may be alive, but whether the circumstances of this case ~~do~~ not warrant that strong probability of his death upon which a court of justice should act. Forty years after the belief had become universal in Europe that the vessels of La Perouse and all on board of them had perished, discoveries were made rendering it highly probable that he and some of his companions had survived, and had lived for many years on one of the islands forming part of the great group through which the vessel of the defendant must have passed, in the successful prosecution of her voyage. The suggestion, that La Perouse might still be living, would have availed little in a French court, against the claim of his heirs to inherit. It would be presumed that he was dead, for courts of justice do not allow the consideration of possibilities to outweigh a case of strong probability, but adopt and act upon those presumptions which seem most in accordance with the ordinary and usual course of events. Presumption, founded in a reasonable probability, must prevail against mere possibilities, for, were it otherwise, the conclusion could never be arrived at that a man was dead, until the natural limit of human life had been reached. Suggestions, quite as well entitled to consideration as those now presented to the court, were offered in the cases of *Twemlow v. Oswin* and *Green v. Brown*, above referred to, but they were not allowed to prevail against the presumption

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which was deemed the proper and reasonable one under the circumstances. Seventeen months having gone by since the defendant may be assumed to have departed upon a voyage, the ordinary limit of which is four months, and nothing having been since heard of the vessel or of those who were in her, the presumption must be that she is lost, and that the defendant and those on board have perished. A greater length of time would strengthen the probability, but sufficient has elapsed to warrant the court in adopting and acting upon that presumption.

The order appealed from is affirmed.

NOTE.—This case was decided at general term, April 3d, 1858, and the 8th of April the following paragraph appeared in the New York Daily Tribune:

"A LOST CAPTAIN FOUND.—The New York correspondent of The Boston Journal states that, some three years ago, the report reached New York that the ship Helena was lost. Her commander, Capt. Thompson, had with him his son, and left in New York his wife and several children. His cargo was a load of coolies; and it was believed that the cargo had risen and murdered the crew. The insurance office paid the policy, and an administrator was appointed for the estate. But Mrs. Thompson has had unwavering faith that her husband and son were alive, and would both return. This week a vessel arrived at this port, and states that they passed and hailed a vessel bound for China, which had on board Capt. Thompson and crew, of the Helena. The news has been hailed with joy, and public thanksgiving was given last Sabbath in the Mariners' Church."

Upon inquiry, however, it appeared that this was not the Capt. Thompson here referred to; nor has he or his vessel been heard from up to September, 1859.

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### JOSEPH J. COOK v. THE NEW YORK FLOATING DRY DOCK COMPANY.

The right of a plaintiff to an extra allowance in a difficult or extraordinary case, is perfect at the time when a verdict is rendered in his favor, although the amount of such allowance may not be determined until afterwards.

In an action for the recovery of money, where the case was difficult, the plaintiff obtained a verdict in his favor at a time when the statute provided that the plaintiff should be entitled to an extra allowance.

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Held, that he was entitled thereto, although the order granting the allowance and fixing its amount was not made until after that provision of the statute had been repealed.

APPEAL by defendants from an order at special term granting an extra allowance. This action was tried before one of the judges of this court and a jury, in February, 1853, and a verdict rendered for the plaintiff for \$6,000. A stay of proceedings was ordered and a case made, on which the defendants moved at special term for a new trial. In March, 1854, a new trial was ordered. From this decision the plaintiff appealed, and the court at general term, in October, 1857, reversed the order granting a new trial, and directed judgment to be entered on the verdict.(a)

The action being a difficult one and for the recovery of money, the plaintiff applied for and obtained an extra allowance, under section 308 of the Code of 1851. The order fixing the amount of this allowance was made in October, 1857, after the repeal of the section referred to, but which was in force at the time of the verdict.

From this order the defendants appealed.

*Benedict, Burr and Benedict*, for appellants.

*Tomlinson, Walden and Brigham*, for respondent.

HILTON, J.—The right of the plaintiff to costs, or to any allowance by way of indemnity for his expenses in prosecuting his action, must depend upon and be determined by the statutes in force in respect thereto at the time he became entitled to be thus remunerated.

By the Code, all previous statutes regulating costs or fees of attorneys in civil actions were abolished, and instead there was allowed to the prevailing party "certain sums by way of indemnity for his expenses in the action," and "which allowances"

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(a) See report of the case, ante, p. 436.

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were in that act "termed costs." Code, § 303. In an action of this nature, these "costs shall be allowed of course to the plaintiff upon a recovery." § 304, sub. 4.

In addition to the costs referred to and specified in detail in section 307, the plaintiff, in a difficult case like the present, wherein a trial has been had, was entitled to an *extra* allowance, the amount of which was left to the discretion of the court. Code of 1851, § 308.

All allowances are by the Code "termed costs," and the plaintiff's right to them accrues upon his "recovery," which, in this case, was at the time of rendering the verdict; and although the *amount* of the extra allowance was not at that time determined, yet the plaintiff's right to it then became fixed, and was given him by statute. *Supervisors of Onondaga v. Briggs*, 3 Denio, 173; *Truscott v. King*, 4 How. P. R. 173; *Holmes v. St. John*, 2 Code Rep. 46; *Taylor v. Gardner*, *ibid.* 47; *Ellsworth v. Gooding*, 8 How. P. R. 3; *Huber v. Lockwood*, 15 *ibid.* 74.

The time when a court is disposed to exercise a discretion ought not, upon any just principles, to deprive a party of a right thus fixed and acquired. *Wilson v. Henderson*, 15 How. Pr. R. 90; *Crary v. Norwood*, 5 Abbott P. R. 219.

Order appealed from affirmed.

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HERMANN KAMLAH and EMIL SAUER v. BENJAMIN SALTER  
and others

In an action on a promissory note, an answer which denies simply that the defendants indorsed and delivered the note to the plaintiff, without denying that they indorsed the note, or setting up any matter assailing the plaintiff's right to the possession thereof, is frivolous.

APPEAL from an order directing judgment on account of the frivolousness of the answer. The complaint, in this case, was upon a promissory note made by the defendants, payable to

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their own order. The complaint averred that the defendants indorsed and delivered the note to the plaintiffs, and that they were the lawful owners and holders thereof. The answer was in these words:

“The defendant, &c., respectfully shows to this court,

“That he denies that the defendants in this action, by their firm name or otherwise, ever indorsed to the plaintiffs the promissory note mentioned and described in the said complaint.

“And he, further answering, denies that the defendants in this action ever delivered to the plaintiffs, or in any way transferred to them, the said promissory note.

“And he, further answering, says, that he has no knowledge nor information sufficient to form a belief, whether or not the said promissory note was ever delivered to the plaintiffs, or transferred to them, in any way by any one.

“And he, further answering, says, that he has no knowledge nor information sufficient to form a belief, whether or not the plaintiffs are the lawful owners or holders of the said note.”

Upon motion, judgment was ordered on account of the frivolousness of the answer. The defendants appealed.

*William H. Forman*, for the appellants. I. In this court an appeal may be taken from an *order* for judgment in such a case as this, without waiting until judgment is perfected. *Lee v. Ainslee*, 4 Abbott Pr. R. 463. II. No answer is frivolous which denies a material allegation in the complaint. *Davis v. Potter*, 4 How. Pr. R. 155, *per* Woodruff, J.; *Hecker v. Mitchell*, 5 Abbott Pr. R. 455; *Lord v. Cheeseborough*, 4 Sandf. S. C. R. 696. III. This answer fully denies all the allegations relating to the title of the plaintiffs. Such an answer has been frequently held not frivolous. *Lord v. Cheeseborough*, 4 Sandf. S. C. R. 696; *Snyder v. White*, 6 How. Pr. R. 321; *Temple v. Murray*, 6 How. Pr. R. 329; *Sherman v. Bushnell*, 7 ibid. 171; *Brown v. Ryckman*, 12 ibid. 313; *Wood v. Reynolds*, 13 ibid. 112; *Met. Bank v. Lord*, 1 Abbott Pr. R. 185; *Hecker v. Mitchell*, 5 Abbott Pr. R. 455.

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The Waterbury Manufacturing Co. v. Krause.

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*J. N. Platt (Platt, Gerard & Buckley), for the respondents.*

BRADY, J.—The plaintiffs allege that the defendants indorsed and delivered to them the note in suit. The defendants deny that they indorsed and delivered it *to the plaintiffs*. The note is payable to their own order. They do not deny that they indorsed the note, nor do they set up any matter assailing the plaintiffs' possession of it. When a note is payable to the order of the maker, and indorsed by him, in legal effect it is indorsed to any person who may hold it, and the denial of the mere act of indorsement or delivery to the holder is not the denial of a material averment. It may be assumed that the thing thus denied is not literally true, and yet the defendants would be liable. The mere possession of the note is sufficient to put the defendants to their defence, if any they have, and as they have not denied any of the facts by which possession could lawfully be acquired, they do not present any defence to the action.

Order of special term affirmed with costs.

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**THE WATERBURY MANUFACTURING COMPANY v. ISIDORE KRAUSE and MORITZ KRAUSE.**

In an action brought against a firm of the name of I. K. & Brothers, M. K. was, by mistake, named as defendant instead of H. K. Although no summons or complaint was ever served upon him, he appeared and answered, denying that he was a partner in the firm. The plaintiffs then moved for leave to discontinue against him without costs, and to substitute the name of H. K. for that of M. K., wherever it occurred in the summons and complaint. On appeal from the order granting the application, *Held*,

- I. That the order rested in the discretion of the court, and was not appealable.
- II. That the circumstances of the case fully warranted the order as granted.

**APPEAL** from an order granting leave to the plaintiff to discontinue, without costs, as against one defendant, and to amend

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The Waterbury Manufacturing Co. v. Krause.

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by substituting the name of another. The facts appear in the opinion of the court.

*P. J. Joachimsen*, for the appellants.

*L. A. Fuller*, for the respondents.

HILTON, J.—This action is brought upon two promissory notes, made by the firm of I. Krause & Bro. By mistake, Moritz Krause was named as one of the defendants instead of Henry Krause, but no summons or complaint was served on him. He, however, appeared, and put in an answer denying that he ever was a partner of Isidore Krause, or that the notes were the partnership notes of the defendants named. The plaintiffs, upon discovering their error, applied, at special term, for leave to discontinue the action against the defendant Moritz Krause, without costs, and also to insert Henry Krause in place of Moritz Krause, wherever it occurred in the complaint and summons. The application was granted, and from the order thus made the defendant Moritz Krause appeals.

The order rested entirely in the discretion of the court making it, and the circumstances of the case fully authorized and warranted it. Code, § 173. The defendant Moritz Krause was never served with process, and, by his appearing and answering, intruded himself into a litigation, the result of which could in no manner affect him or his interests. Code, § 136.

Besides, an order of this kind is not subject to review at general term, and is not appealable. Code, § 349.

Appeal dismissed, with costs.

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The New York and Harlem Railroad Co. v. The Mayor, &c., of New York.

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**THE NEW YORK AND HARLEM RAILROAD COMPANY v. THE  
MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF  
NEW YORK, THE BOARD OF COMMISSIONERS OF THE METRO-  
POLITAN POLICE DISTRICT, and FREDERICK A. TALLMADGE,  
Superintendent, &c.**

This court has jurisdiction of all actions against the corporation of the city of New York, upon any cause of action whatever, whether it be of a legal or equitable nature.

*So held* in an action to restrain the enforcement of an ordinance of the corporation, upon the ground that it was passed in violation of an agreement entered into by the corporation with parties affected by the ordinance: and also that it was illegal and unauthorized by law.

The Board of Metropolitan Police Commissioners are not state officers, within the meaning of Chap. 488 of Laws of 1851, p. 920. They are officers of a locality or district, and, in a proper case, may be restrained by this court, in the exercise of its equity powers, in like manner and to the like extent as other local or county officers.

The only limitation upon the legislative power and control of the corporation of New York city over the streets within its limits is, that they shall be appropriated to no use or purpose which is not alike free and common to all travellers. This power cannot be surrendered, either in whole or in part, into the hands of any person or persons, without previous legislative sanction.

*It seems* that converting the streets to railroad purposes, and permitting rail tracks to be laid upon them, and used by an association or individuals for carrying merchandise or passengers for hire, is devoting them to an exclusive use, and cannot be permitted without the express authority of the legislature.

And although the power to grant this permission must be derived from the legislature, yet the corporation, by exercising it, is not deprived of its control over the streets in all other respects; and it may, in the grant, impose such conditions respecting the manner in which the rail tracks shall be used, and upon which the future use thereof shall depend, as it may think proper.

By the act of the legislature incorporating the N. Y. & H. R. R. Co., passed April, 1831 (Laws 1831, p. 323), it was provided, that nothing contained in it should authorize the construction of their railway across or along any of the streets of the city of New York without the consent of the mayor, &c., who were thereby authorized to grant permission to so construct it, or to prohibit its construction; and, if constructed, to regulate the time and manner of using the same, and the speed with which carriages might move on it.

In December, 1831, on the application of the company, an ordinance was adopted by the mayor, &c., permitting the track to be laid in certain streets, providing,

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however, that if, after its construction, it should, in the opinion of the mayor, &c., constitute an obstruction or impediment to the future regulation of the city, or the ordinary uses of any street or avenue, the company should forthwith provide a satisfactory remedy therefor, or remove the rails; and, also, expressly reserving and retaining to the mayor, &c., the right to regulate the description of propelling power to be used on the track, and the speed of the same, as well as all other power reserved in the act of incorporation. The ordinance was to have no binding force, or go into effect, until the railroad company, in writing and under seal, covenanted to abide by and perform its conditions. An agreement of this nature was executed and filed in the office of the city comptroller, and thereupon the company laid their track on the Fourth avenue and other streets. In December, 1854, the mayor, &c., of New York prohibited the running of steam engines, or locomotives, on the track of the company on Fourth avenue south of Forty-second street, after eighteen months from that time.

*Held.* 1. That the ordinance was valid, and was not a violation of any of the franchises granted to the railroad company.  
2. That granting permission to lay the track did not deprive the mayor, &c., from subsequently regulating its use by the company.  
3. That the agreement of the company was valid as a *restriction* upon its corporate power, and was in no sense a *transfer* of it.  
4. That the corporation can make no valid contract which will interfere with its legislative control over the streets; and any such contract, if made, is revocable at its pleasure.

A party, applying to a court for the application of its equitable powers, should be held to the rule, "that he who seeks equity must do equity." He will not be allowed to found his claim upon a permission in a contract, while he repudiates the conditions upon which the permission was granted.

A corporation, like an individual, may be bound by an implied contract, provided the subject matter of it is within the scope of its corporate authority.

Courts are bound to assume, where a discretion is vested in a municipal body, exercising functions of a legislative character, that good reasons existed for doing an act which was the result of such a discretion.

The duty of enforcing *all* the public ordinances of the city of New York, especially those applicable to police or health, is imposed by law upon the Board of Metropolitan Police Commissioners. The ordinance in question might be classed under either head.

When a motion is brought before the court upon an order to show cause, the order is regarded as a notice of motion, and the party obtaining it entitled to open and close the argument.

*At Special Term, July 30, 1858.*

MOTION for injunction to restrain the enforcement of an ordinance adopted by the corporation of the city, prohibiting the use

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of steam engines, or locomotives, upon the track of the plaintiffs on Fourth avenue, below Forty-second street.

The application was founded upon a complaint duly verified, the substance of which sufficiently appears in the opinion.

The agreement and ordinance, under which the plaintiffs were permitted originally to lay their rail track upon the streets of the city, are as follows:

“ Articles of agreement made this ninth day of January, one thousand eight hundred and thirty-two, between the New York and Harlem Railroad Company, parties of the first part, and the Mayor, Aldermen and Commonalty of the city of New York, parties of the second part: Whereas, an ordinance of the Common Council of the city of New York was passed by the Board of Aldermen on the sixteenth day of December last, and by the Board of Assistants on the nineteenth day of December last, and approved by the Mayor of the said city on the twenty-second day of December last, which ordinance is in the words and figures following, to wit: ‘A law to authorize the New York and Harlem Railroad Company to construct their railway.

“ Sec. 1. Be it ordained, &c., that the New York and Harlem Railroad Company be, and they are hereby permitted to construct and lay down, in pursuance of their act of incorporation, a double or single track or railroad or railway along the Fourth avenue, from Twenty-third street to the Harlem river, in conformity to a map now on file in the Register’s office, and a branch thereof along One Hundred and Twenty-fifth street, from the Fourth avenue to the Hudson river; provided that the width of such double railroad or way shall not exceed twenty-four feet.

“ § 2. And be it further ordained, That if, at any time after the construction of the aforesaid railways by the said New York and Harlem Railroad Company, it shall appear to the Mayor, Aldermen and Commonalty of the city of New York, that the said railways, or any part thereof, shall constitute an obstruction

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or impediment to the future regulation of the city, or the ordinary uses of any street or avenue (of which the said Mayor, Aldermen and Commonalty shall be the sole judges), the said railroad company, or the directors thereof, shall, on the requisition of the said Mayor, Aldermen and Commonalty, forthwith provide a remedy for the same, satisfactory to the said Mayor, Aldermen and Commonalty ; or, if they fail to find such remedy, they shall, within one month after such requisition, proceed to remove such railway or other obstruction or impediment, and to replace the street or avenue in as good condition as it was before the said railway was laid down ; and should the said directors decline or neglect to obey such requisition, the said Mayor, Aldermen and Commonalty may, upon the expiration of the time limited in such notice, cause the obstruction or impediment to be removed and the avenues or streets restored, as aforesaid, at the expense of the said railroad company.

“ ‘ § 3. That the right of regulating the description of power to be used in propelling carriages on and along said railways, and the speed of the same, as well as all other power, reserved to the said Mayor, Aldermen and Commonalty, by the act of incorporation of the said company, or any part thereof, be, and the same are hereby expressly retained and reserved.

“ ‘ § 4. That it shall especially be incumbent on the said Harlem Railroad Company, at their own cost, to construct stone arches and bridges for all the cross streets, now or hereafter to be made (which will be intersected by the embankments or excavations of the said railroad), and which in the opinion of the Common Council the public convenience requires to be arched or bridged ; and also to make such embankments or excavations, as in the opinion of the Common Council may be required to make the passage over the railroad and embankments at the intersected cross streets easy and convenient, for all the purposes for which streets and roads are usually put to ; and also, that the said company shall make, at their own like cost and charges, all such drains and sewers as their embankments or excavations may, in the opinion of the Common Council, make necessary ;

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all which work to be done under the like requisitions and under like disabilities as in the second section of this ordinance mentioned; and, further, that the said company shall make their railroad path, from time to time, conform to what may hereafter be the regulations of the avenues and roads through which said railroad passes.

“ ‘ § 5. That it shall be incumbent on the said Harlem Railroad Company to commence and complete their said railroad in the respective times allowed for that purpose in their act of incorporation, and unless they commence and complete the same in the periods of time for the said commencement and completion in said incorporation specified, that then the consent of the Common Council and all the powers and privileges given in this ordinance shall cease and be null and void.

“ ‘ § 6. That in case the said railroad should not be completed within the times for that purpose in their charter mentioned, or if, at any time after the construction of the said railroad, the same should be discontinued or not kept up and in repair, as a good and sufficient railroad, that then the strip of land to be taken for the said railroad should be thrown open and become as part of the street or public avenue, without any assessments on the owners of adjoining lands or the public therefor.

“ ‘ § 7. That no building shall be erected on said strip of land to be taken for said railroad, and that such railing or other erections shall be made on the outer edges of the embankments or railroad path, and also such railings or fences on the edges of the excavations, as the Common Council shall from time to time deem necessary to prevent accidents and loss of lives to our fellow-citizens.

“ ‘ § 8. That this ordinance shall not be considered as binding on the Common Council, nor shall the said ordinance go into effect until the said Harlem Railroad Company shall first duly execute (under their corporate seal) such an instrument in writing, promising, covenanting and engaging, on their part and behalf, to stand to, abide by, and perform all the conditions and

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requirements in this ordinance contained, as the Mayor and the Counsel of the Board shall by their certificate approve, and not until such instrument shall be filed, so certified, in the Comptroller's office of this city.

“ ‘Passed by the Board of Aldermen, December 16, 1831.

“ ‘Passed by the Board of Assistants, December 19, 1831.

“ ‘Approved by the Mayor, December 22, 1831.’

“ *Now, this agreement witnesseth:* That for and in consideration of the premises, and in pursuance of the requirements of the eighth section of the said ordinance, the said parties of the first part do hereby, for themselves and their successors, promise, covenant and engage, to and with the said parties of the second part, and their successors and assigns, to stand to abide by, and perform all the conditions and requirements in the said ordinance contained.

“ In witness whereof, the said parties of the first part have hereunto affixed their corporate seal, and caused the same to be signed by their Vice President (in the absence of their President) and attested by their Secretary, the day and year aforesaid.

“ JOHN MASON, *Vice President.* [L. S.]

“ Witness, ISAAC ADRIANCE, *Secretary pro. tem.*”

[Endorsed]

“ Between the New York and Harlem Railroad Company, and the Mayor, &c., of the City of New York.”

“ COVENANT.

“ We hereby certify that we approve of the within, as being such an instrument in writing as the New York and Harlem Railroad Company are required to execute and file in the Comptroller's office, according to the eighth section of the ordinance within recited. Dated January 13th, 1832.

“ WALTER BOWNE, *Mayor.*

“ R. EMMET, *Counsel, &c.*”

“ Filed on Monday, January 16th, 1832.

“ T. J. WATERS, *Comptroller.*”

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The application was founded upon an order to show cause why an injunction should not be granted of the character stated, and restraining the defendants in the mean time.

The defendants read many affidavits in opposition, to show the representations made by the plaintiffs to the corporation, at various times, when action was being had in respect to the use of their track; the reasons which induced the passage of the prohibitory ordinance; and also showing that the running of steam engines on the track below Forty-second street created a nuisance, injurious to the neighborhood adjacent to Fourth avenue. Affidavits were also read by the plaintiffs, rebutting, to some extent, the new matter set up by the defendants.

After reading these papers, counsel for defendants claimed that, as they appeared under an order to show cause why an injunction should not issue against them, they were entitled to open and close the argument which might be presented upon the hearing of the motion.

The judge, however, held that an order to show cause should be considered as a notice for all the purposes of a motion, and did not at all affect the rights of the parties in respect to the manner in which they should be heard before the court. That, in cases of this kind, the plaintiff should be regarded as the moving party, and, as such, entitled to open and close the argument.

*Charles W. Sandford and Charles O'Conor*, for the plaintiffs.

I. The objections touching the jurisdiction of the court, and the fitness of the remedy by injunction, presented by all the defendants, except the corporation of the city of New York, cannot be sustained—

1. It certainly is not now an open question in this court, whether the court has jurisdiction of a suit or action against the corporation of New York. It is "established by law," in the city of New York, and, as such, subject to the jurisdiction of this court. Code, § 33, subd. 3.

2. The 488th chapter of the laws of 1851, p. 920, refers to the

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officers and boards mentioned in the fifth article of the constitution. "Public officers of the state" is a phrase which has been long known in our law, and embraces nearly all the officers in the state. R. S., part 1, chap. 5. The term "state officers," or "state board of officers," has been employed in ordinary speech to designate the officers immediately connected with the administration of the state government. Laws of 1847, p. 395; art. 5, § 1; marginal note; *Christman v. Floyd*, 9 Wend. 342; Const. 1846, art. 4.

a. This act is not more properly applicable to district officers than to county officers.

b. If capacity to perform duties in any part of the state, and being appointed by the state, brings these officers within this act, all *notaries* are within it.

c. The offices in question were created subsequently to the act of 1851, and, therefore, are not within its purview.

3. Although it is true that equity will not generally interfere to prevent simple trespasses which may easily be compensated by damages, yet, where an act or course of action, which is in itself no more than a trespass, is, nevertheless, of such a character that it breaks up existing arrangements, thus depriving an individual of his livelihood, or a corporation of the means of carrying on its operations, and exercising its functions, equity, seeing that the mischiefs are not likely to be compensated in damages, and, consequently, are legally irreparable, will interpose its preventive process. Story's Eq. Jur., § 926; Drewry on Eq., p. 337; side paging, § 10; V. C. Wigram, 3 Eng. Railway Cases, 362; *North Union R. R. Co. v. Bolton and Preston R. R. Co.*, *ibid.* 366.

4. The corporate character of the municipal body does not place it beyond the reach of this remedial process, or enable it to crush, at a blow, a railroad corporation chartered by the state, unless it has a legal warrant for so doing. Story's Eq. Jur., §§ 869, 870; and note 5 to latter section; *Varick v. Mayor of New York*, 4 Johns. Chy. 53; Story's Eq. Jur., § 955, a; *Freewin v. Lewis*, 4 Mylne and Craig, 254.

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II. The powers of the metropolitan police board do not affect the question. What the city council cannot lawfully sanction, that board cannot justify under an ordinance of the city council.

The corporation cannot rightfully employ the whole metropolitan police force, arbitrarily, and with strong hand, to enforce its decrees.

1. This ordinance has nothing to do with the "*police or health*," within the meaning of section 5 of the metropolitan police act. Laws of 1857, Vol. II, p. 202; Bouvier's Dic. Police.

2. The license allowed by the common law, to arrest offenders without warrant, is designed for cases of sudden emergency. It never can justify calling out an army to stop the regular operations of a railroad corporation, without previous judgment or judicial process. 6 Carr. & Payne, 741; 2 Esp. N. P. 540.

3. Even if that remedy could be lawfully used against such an offender in any case, then, however lawful the ordinance of the common council may have been, the present case does not fall within its sphere of operations; for non-compliance with that ordinance is not an offense or misdemeanor. No penalty is attached to it. Laws of 1833, p. 18, §§ 20, 21; Laws of 1853, p. 446, § 5.

III. The railroad charter, section 1, expressly provides that the propelling power shall be such as "the company may choose to employ," and there is nothing in the charter to qualify this unrestricted grant of the sole and exclusive authority on this head. 4 Gill & John. 94.

The sixteenth section did not create a revocable power in the city corporation to permit the construction of the railroad, or to supervise the question of motive power. Its terms and the policy of the charter forbid such a construction.

1. The power there reserved to the city corporation is distinctly placed under three heads: First, as to the construction of the way or track; second, as to the *time* and manner of using the track; third, as to the *speed* of carriages.

2. However comprehensive the word "manner" might be if it stood unaffected by terms limiting its application to the track,

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it is here expressly so limited, and excluded from any reference to the carriages or their propulsion.

3. The motive power is placed under the supervision of the directors by section one, and the "speed" alone subjected to the control of the city corporation.

4. After an investment of the whole capital by the subscribers, it would have been unjust, and, therefore, unwise, to place the whole enterprise under the absolute control of the city council, and in a perfect state of dependence on it. Consequently, no power of revoking the license to construct was given; nor would it be reasonable to construe the special and minor powers of regulation, which were granted, as authorizing a prohibition. *Per Strong, J., Milhau v. Sharp*, 15 Barb. 228.

IV. When the legislature distributes power over a subject among different classes of subordinates, they may not lawfully vary the distribution by contract among themselves. Consequently, any power to break up or prohibit the railroad, conferred upon the city corporation by the agreement of 1832, is void.

V. The proceedings which have been had, by mutual arrangement, between the city corporation and the railroad company, with the concurrence of the legislature, and the adjacent proprietors, amount to an agreement which equity will compel the parties to observe in good faith.

1. Corporate bodies may enter into engagements in like manner as individuals, so long as they act within the scope of their delegated powers. Formal instruments, under seal, are not necessary: Equity will enforce against them the principles founded on the doctrine of part performance. *Canal Company v. Railroad Company*, 4 Gill & Johns. 3, 5.

2. After the vast expenditures consequent upon the compliance of the railroad company, equity will not permit the city corporation, arbitrarily, to rescind the arrangement which has been made.

3. Strictly speaking, the railroad between Forty-second and Thirty-second streets is not built across or along any street or avenue of the city of New York. The whole legal notion of a

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street or highway, and all public rights of enjoyment or regulation concerning it, appertain to the surface. All rights and interests beneath the surface are special, and depend, as in other cases of proprietary interest, on the circumstances of the particular case. In this case, the railroad is placed, pursuant to contract, in a vault beneath the surface, and withdrawn from interference with the highway. The contract which they made with the city corporation is entitled to the same equitable protection that would be afforded to any of the thousands who own vaults constructed under public streets, in virtue of informal licences from the city authorities.

4. The original agreement between the city corporation and the railroad company, if valid, furnishes an additional ground of ~~claim~~ on the part of the railroad company to be left in undisturbed enjoyment of its *vault*.

VI. There is no foundation for the idea of nuisance, relinquishment of right, or contract to remove, set up by the defendants.

1. A slight amount of smoke at intervals, such as frequently disturbs the inhabitants of cities located near manufactories, does not constitute a nuisance. And where the persons complaining moved within the sphere of the alleged nuisance and planted themselves by its side, of their own choice, long after its erection, courts of equity will not listen to the suggestion of nuisance without a full trial and a finding of the fact.

2. The only person who pretends to have acted upon the ordinance of 1854 is Dr. Ten Eyck. He could not have been influenced by the panic of the company, and its attempted sale and removal in 1857.

3. There is no ground for denying the company its just rights, because of the temporary apprehension entertained by its officers, that the city corporation had absolute and irresponsible power.

*David Dudley Field and Greene C. Bronson*, for the defendants, the Board of Police Commissioners.

I. The Court of Common Pleas has no jurisdiction of this ac-

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tion. The third subdivision of the thirty-third section of the Code, on which alone the plaintiffs must rely, does not authorize an action against a municipal corporation to restrain the execution of an ordinance.

II. This court has no jurisdiction to restrain the police commissioners. They are state officers, and compose a board of state officers. An injunction against such a board can be issued only by the Supreme Court at a general term. An injunction granted by the Supreme Court itself, at a special term, against state officers, has been lately disregarded, and the court appear to have acquiesced in the act. *Acts of 1851*, ch. 488.

III. If this court had jurisdiction of the action against the city, and could restrain the board of police, still it would not entertain this action, because, as a court of equity, it is not competent to control by injunction the execution of a municipal ordinance by public officers. If the officer act illegally, or enforce an illegal ordinance, he is responsible for the trespass; but it is not the province of a court of equity to restrain the commission of a trespass. *7 Johns. ch. 315.*

IV. Should the court, however, determine to take cognizance of the case, and to hear the question upon its merits, the injunction should be refused, for the reasons which follow.

V. The authority of the city over the Fourth avenue, and the regulation of its use, has not been surrendered or taken away. The original charter of the Harlem Railroad Company (*Laws of 1831*, ch. 263, § 16) carefully guarded this right. The company acknowledged it when asking for permission to lay down their rails. The city granted permission, reserving the right to revoke it at pleasure. The company entered into a covenant to abide by this reservation. After this, to insist that the city has lost the reservation, is not only to reason loosely, but to act in bad faith.

The 16th section of the charter provided, first, that the company should not *construct* or *use* their railway in any of the streets or avenues, whether opened or unopened, without the consent of the city; and, as if to prevent such a consent being given as might restrict its subsequent control over the road, it

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was further provided, that after the construction of the road, the city should have authority to regulate the time and manner of using the same.

Two guarantees of the city's rights were thus secured: first, the necessity of its previous consent, and, second, its continuing authority over the manner of using the railway. *Drake v. Hudson River R. R. Co.*, 7 Barb. 541, 548, 551, and *Milhau v. Sharp*, 15 *ibid.* 207.

We have the company here bound in three ways: first, by the reservation in the ordinance; second, by the covenant of the company; third, and best of all, by the explicit terms of the law which gave the company its existence.

It is, however, hinted, rather than plainly asserted, that the control, which in 1832 was thus reserved to the city, over the use which the public might make of the public avenues, has been somehow taken away, or lost by the subsequent legislation of the state, or the subsequent conduct of the city.

As to subsequent state legislation, there are two answers: first, that there has been none; and, second, that there could have been none. The subsequent grant to the Harlem company of the powers of the New York and Albany Railroad Company does not affect the question, because the New York and Albany railroad was to begin "on the island of New York, where the Fourth avenue terminates at the Harlem river." Laws of 1832, ch. 162, § 1.

The grant to the New Haven railway in 1848, of the right to run their cars and engines over the road of the Harlem company "as far into the said city as the said Harlem railroad may extend, upon such terms and to such point as has been, or may hereafter be agreed upon between the said companies" (Laws of 1848, ch. 143, § 6), did not exempt the Harlem Railroad Company from the control which the city then had over it. This section was intended to give to the New Haven railway rights against the Harlem railway, not to enlarge the powers of the latter. The language does not go beyond this intent. The New Haven company may go as far as the Harlem company. But

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how far is that? Just so far as the common council permits, and no further. It extends to Forty-second street for one purpose; it extends to the Astor House for another.

If, however, the act of 1848 could be held, as it cannot, to have in terms released the Harlem company from municipal control, it would be for that very reason void. The rights of the city over the street, which it owns in fee, could not thus be taken away, nor could the obligation of the covenant made between the company and the city in 1832 be thus impaired: *Fletcher v. Peck*, 6 Cranch, 87; *Dartmouth College case*, 4 Wheat. 518.

If the legislature of the state, subsequent to 1831, has not taken away the control of the city over the Harlem railway, no more has the city itself surrendered its control. Indeed, it may here be said that the city could not have surrendered it. Its legislative power over the streets cannot be given up or impaired by any contract or act. There can be no estoppel against public officers. *Gray v. Mayor of Cambridge*, 4 Cranch; *Coats v. Mayor*, 7 Cow. 585; *Britton's case*, Supreme Court, MSS. There is no occasion, however, to invoke this principle of law, for the city has done nothing that looks even like a surrender of its rights. What are the acts of surrender pretended? First, it is said that the ordinance compelling the company to arch over the tunnel was such an act; and, secondly, it is said, that the report of the committee of the common council, accepting the offer of the company to cut down the grade of the Fourth avenue, on the east side, between Thirty-second and Thirty-fourth streets, was another such act. It is perfectly clear, that in neither of these transactions was any such surrender *expressly* made. There is not a word about waiver, surrender, or loss of any of the rights or authority of the city. Is such a surrender, then, *implied*? That cannot be, unless it be clearly against good faith and fair dealing for the city, at any time after these acts, to insist upon the discontinuance of steam below Forty-second street.

VI. The ordinance of the city, which directed the company



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to discontinue the use of steam below Forty-second street, was a valid act of municipal legislation, regarding merely the authority of the city government over the streets, and the reservations contained in the act of the legislature, the ordinance of the city, and the covenant of the company. It was a valid act of municipal legislation for another reason. The use of steam engines in the tunnel, or across the sidewalk at Forty-second street, is a plain nuisance. The affidavits establish this fact. That is a nuisance which injures health, or is offensive to the senses, or renders the enjoyment of life and property uncomfortable. *Catlin v. Valentine*, 9 Paige, 675; *Fish v. Dodge*, 4 Den. 311; *Brady v. Woods*, 3 Barb. 159. One of the first duties of the common council is, to order a nuisance to be removed.

VII. The ordinance being valid, it was the duty of the Board of Police to enforce it. Act of April 15, 1857, chap. 569, §§ 5, 20. Suppose the company were to attempt to run its locomotive, with a train, through Broadway, or down Centre or Chatham streets, will any sane man suppose that the police are to abstain from interference? If the ordinance in question be valid, and of that we suppose there can be no reasonable doubt, it is as illegal to run steam engines on the Fourth avenue, below Forty-second street, as it would be to run them in Broadway.

VIII. The whole history of the relations of the plaintiffs to the city shows a disregard of their obligations to it, and a contumacy towards its authority, which deserves the severest condemnation. When powerful corporations and persons of influence set the example, it is not surprising that disobedience to the laws should be so general.

IX. This is an attempt to prevent the execution of a municipal law, by a corporation which has defied it already for more than two years. An injunction ought never to be allowed, and cannot safely be issued to prevent the enforcement of law. The execution of the laws is already lax enough—too lax, indeed, for the good order of society—the good name of the country. It is to be hoped that no countenance will be given to this attempt to enlist the courts, not in the work of enforcing, but of obstructing them

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*Richard Busteed and Gilbert Dean*, for the defendants, the Mayor, &c., of New York.

I. This case is a very simple one. The Harlem Railroad Company claims to have a vested right to run its locomotives, propelled by any power it sees fit to employ, over its railroad, located on the Fourth avenue in this city, down to its machine shops and depot at Thirty-second street. This right, if it exists in behalf of this artificial being, must be derived from some laws of the state or municipal grant.

II. If it exists, no matter in what manner obtained, or from what source derived, it must be set out in the complaint, on which alone the temporary injunction was issued, and which alone the plaintiff claims contains enough to warrant his prayer for an injunction restraining the municipal corporation of New York from enforcing an ordinance duly passed.

III. The passage of the resolution, forbidding the use of steam on the Fourth avenue below Forty-second street, is not in violation of any right or franchise of the New York or Harlem Railroad.

a. By the charter and laws, the absolute control of the streets within the city is vested in the Mayor, Aldermen and Commonalty, &c. As to the street or avenue in question, the fee in trust for the public is so vested.

b. The charter of the Harlem Railroad Company makes the right to occupy any of the streets or avenues, whether "such streets or avenues had been opened or not," to depend entirely on the "consent of the Mayor, Aldermen and Commonalty." And after the road has been constructed, the mayor, aldermen and commonalty are authorized, by the said charter, "to regulate *the time and manner* of using the same." By this, full power to say whether "the same," that is, the road, shall be used in the night time or the day time, and "the manner," that is, the kind of power, and the description of cars, that shall be used, is reserved to the city.

c. The corporation of the city, and the railroad company, have so construed this charter; and never until now has any

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such claim been set up. Contemporaneous construction should prevail, even if it were doubtful what would be the real one.

d. Not only have the corporation the right thus to control the action of the Harlem Railroad Company, when using its streets, but it has never pretended or professed to surrender it, and it would be a breach of duty in the municipal government to surrender this right. Opinion of Comstock, J., in *Davis v. The Mayor, &c., of N. Y.*, 4 Kernan, 506. The fact that the road runs *under* the avenue does not affect the question.

e. The right to regulate the time and manner of using the streets of a crowded city is necessarily exclusive and sovereign, and must be reposed in the local government.

f. The charter of plaintiffs was accepted with a full knowledge of the law, and on the condition that it should be held subject to the will of the local government, and thus became and was a part of that charter, even if it had not been in terms incorporated in it.

g. The rights of the company depend wholly on its charter. If the legislature have authorized it, locomotives may, without the assent of the municipal government, run from the City Hall to the Battery, provided the right of way has been acquired; and the converse of the proposition is equally true.

The amendment of 1848 does not confer any rights on the Harlem road, as to their engines.

IV. The common council had full authority to adopt the resolution; and being the exercise of its legislative authority, the reason of that exercise cannot be inquired into here. 1. The municipal government of the city is not here to justify the expediency of the passage of the resolution or ordinance in question. *It willed it, and therefore it did it.* Not even in a court of justice can the motives which prompted a legislative act be questioned. *Milhau v. Sharp*, 15 Barb. Sup. Ct. R. 193.

"So far as the common council acts in the exercise of its public political powers, and within the limits of its charter, it is vested with the largest discretion; and whether its laws are wise or unwise, whether they are passed from good or bad motives,

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it is not the province of a court to inquire." 18 Wendell, 99; 17 How. 29, 30. 2. No court, in justifying an order restraining the common council, has ever claimed the right to supervise, inquire into, or review the legislative acts of the board. The reason or excuse has been found in some alleged excess of jurisdiction, violation of a trust, in regard to private property or right, or on some ground other than an interference with the legislative powers of the board. 3. The celebrated contempt case of the *People v. Sturtevant* is no exception to the rule stated. The Court of Appeals, in 5 Selden, 271, put the decision on the ground that the act was not one of municipal legislation, but a grant upon condition. 4. The corporation has the exclusive right to control or regulate the use of the streets in the city, and in this respect is endowed with legislative sovereignty. 17 Barb. 438; *Davis v. The Mayor, supra.* 5. This power, being a delegated one, cannot, by the corporation, without the assent of the state legislature, be delegated. *Barto v. Himrod*, 4 Selden, 483; 17 Barb. 438. 6. The whole subject of the regulation of the streets, carriage way, and sidewalks, and the manner in which they shall be used, is in the corporation, and must remain subject to its control. 7. It follows that, no matter what arrangement the corporation has made with the railroad company, as to the use of a street, it is either revocable or it is void.

V. The resolution or ordinance complained of is not in violation of any contract, agreement, or understanding between the plaintiffs and the common council. 1. The grant made to the railroad company was conditional, and the contract renewed the power of regulation and revocation. 2. The other arrangements, agreements, and inducements are not in the complaint set out as in writing, and are too vague, indefinite, and uncertain, to found any right of action on. But, besides this, they are all denied. 3. The plaintiffs have no cause of complaint, when the franchises they enjoy are taken into account.

VI. An injunction is not the remedy, even if the action of the board in passing the resolution or ordinance was unwise, impoli-

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tic, or oppressive. An application for a repeal or modification should be made.

HILTON, J.—The plaintiffs are a railroad company, incorporated by an act of the legislature, passed April 25th, 1831 (Laws 1831, p. 323), with power to construct a railroad, or way, from Twenty-third street to the Harlem river, and "to transport, take, and carry property and persons upon the same, by the power and force of steam, of animals, or any mechanical or other power, or of any combination of them, which the said company may choose to employ." The act contains eighteen sections, most of which are devoted to the manner in which the capital stock shall be subscribed, and the right of way acquired upon the route, to be fixed ~~upon~~ by the company, subject to the approval of the common council of the city of New York. After provision is made respecting these subjects, section sixteen further provides, that "nothing in this act shall be deemed to authorize the said corporation to construct or use their railroad, or way, across or along any of the streets or avenues, as designated on the map of the city of New York, whether such streets or avenues shall have been opened or not, without the consent of the mayor, aldermen, and commonalty of said city, who are hereby authorized to grant permission to the said corporation to construct their said railroad, or way, across or along said streets or avenues, or prohibit them from constructing the same; and, after the same shall be constructed, to regulate the time and manner of using the same, and the speed with which carriages shall be permitted to move on the same, or any part thereof," &c.

On December 22d, 1831, the mayor, aldermen, and commonalty of the city of New York, upon the application of the plaintiffs, adopted an ordinance permitting a railway, or track, to be laid down pursuant to this act, and in conformity with a map on file in the register's office. Section two of the ordinance is to the effect, that if, at any time after the construction of the railway, it shall appear to the mayor, aldermen, and commonalty of the city of New York, that the railways, or any part

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thereof, constitute an obstruction or impediment to the future regulation of the city, or the ordinary uses of any street or avenue (of which the mayor, aldermen, and commonalty should be the sole judges), the plaintiffs, or the directors thereof, shall, on the requisition of the said mayor, aldermen, and commonalty, forthwith provide a remedy for the same, satisfactory to the mayor, aldermen, and commonalty; or if they fail to find such remedy, they shall, within one month after such requisition, proceed to remove such railway, or other obstruction or impediment, and to replace the street or avenue in as good condition as it was before the railway was laid down, &c. By section three, the right of regulating the description of power to be used in propelling carriages on and along the railways, and the speed of the same, as well as all other power, reserved to the said mayor, aldermen, and commonalty, by the act of incorporation of the plaintiffs, was expressly retained and reserved. By section eight it was declared, that the ordinance should not be considered as binding on the common council, nor should it go into effect until the plaintiffs first duly execute, under their corporate seal, an instrument in writing, promising, covenanting, and engaging, on their part and behalf, to stand to, abide by, and perform all the conditions and requirements of the ordinance, such as the mayor and counsel to the board should approve; and, when so signed and approved, to be filed with the comptroller.

On January 9th, 1832, the plaintiffs accordingly executed, under their corporate seal, and filed with the comptroller, an agreement reciting the ordinance, and in consideration thereof, and pursuant to its requirements, covenanted, engaged, and promised, on their part, to stand to, abide by, and perform all the conditions and requirements contained in it. After having thus obtained the consent of the corporation of the city, the plaintiffs proceeded to, and did acquire, under their act of incorporation, the title to a strip of land twenty-four feet in width in the Fourth avenue, extending from Twenty-third street to the Harlem river, and upon which their track is now laid.

Subsequently, and in 1848, the avenue was opened as a public

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street, in the manner prescribed by law, and by which it appears the plaintiffs' title, thus acquired, was extinguished.

In December, 1844, and while the engine-house and steam-depot of the plaintiffs was located on the avenue at Twenty-sixth street, the mayor, aldermen, and commonalty adopted a resolution or ordinance requiring the discontinuance of steam power below Thirty-second street, prior to August 1, 1845. This direction was not complied with until the fall of 1846, when the plaintiffs removed their engine-house, machine-shop, &c., to Thirty-second street, upon the alleged suggestion and assurance of the corporation of the city that the location at Thirty-second street would be permanent, and not subject to further interference. Under these suggestions and assurances, it is alleged, that the plaintiffs have constructed improvements at the location named, at an expenditure of upwards of \$94,000.

On August 8, 1850, the mayor, aldermen, and commonalty adopted a resolution requiring the plaintiffs to construct an arch over that part of their road which was laid in the trench cut through the avenue at Murray hill, and extending from Thirty-second to Forty-second streets. The plaintiffs were induced, as they allege, to acquiesce in this measure, and make the expenditure requisite to construct the arch, under assurances made before the committee of the common council, that such improvement would obviate all objections to the permanent erection of the depot at Thirty-second street.

After the arch had been completed in accordance with the resolution, and on December 27, 1854, the mayor, aldermen, and commonalty adopted a resolution or ordinance in the following words: "*Resolved*, That no locomotive or steam engine be allowed to run on the tracks of the Harlem and New Haven railroad company on Fourth avenue, south of Forty-second street, eighteen months after the passage of this ordinance." The plaintiffs neglected to conform to this requirement, and the Board of Commissioners of the Metropolitan Police district made an order directing their superintendent to enforce it. The plaintiffs rest their refusal to obey it on the ground that the ordinance was

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passed in violation of their rights and franchises, as granted by acts of the legislature; claiming that it is without any legal or equitable authority to authorize its passage; and also that it is in violation of the aforesaid agreement.

Upon a complaint embodying substantially the facts stated, and alleging that the enforcement of the ordinance of December, 1854, would be ruinous to the business of the plaintiffs, this court is asked to restrain the defendants from interfering with the running of the steam engines of the plaintiffs, or of the New York and New Haven Railroad Company, upon the Fourth avenue to Thirty-second street.

In opposition to this application, the defendants have furnished affidavits showing that Murray hill, and the lands adjacent to the plaintiffs' engine depot at Thirty-second street, has become a thickly settled part of the city, and is used as a place of residence by citizens who have erected there valuable and expensive buildings; that the plaintiffs have placed their rails on the sidewalk and carriage-way of the avenue at Thirty-second street, and use them with their cars and engines in such a manner as to render that part of the avenue highly dangerous to travellers on foot, or in their own vehicles, and that the smoke, gas, and noise resulting from the running of locomotive engines on the avenue below Forty-second street, creates a nuisance noxious and offensive to the neighboring inhabitants, and materially interfering with the proper enjoyment by them of their property.

Upon the argument, the counsel for the police commissioners presented two preliminary objections, which seem entitled to attention.

*First.* That this court has no jurisdiction of an action of this nature against the corporation of the city.

The jurisdiction of this court is partially defined by section thirty-three of the Code of Procedure. It extends to actions which relate to the determination in any form of a right or interest in, and for injuries to, real property; to actions of partition and foreclosure; to certain actions for the recovery of a penalty or forfeiture imposed by statute; and to actions against public

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officers in certain cases; also to all other actions where the defendants reside, or are personally served with summons, in the city; or where one or more of several defendants, jointly liable on contract, reside or are personally served with summons within the city; *and also* to actions against corporations, created by or under the laws of this state, and transacting their general business, or keeping an office for the transaction of business, *within the city, or established by law therein*; or created by the laws of any other government, for the recovery of any debt or damages, whether liquidated or not, arising upon contract made, executed, or delivered within this state, *or upon any cause of action arising therein*. Code, §§ 38, 123, 124; Laws of 1847, p. 279, § 7; *ibid.* 1854, p. 484. The constitution (Art. 8, § 3) ~~also~~ provides, that "all corporations shall have the right to sue, and shall be subject to be sued, in all courts in like cases as natural persons."

These provisions of law would seem decisive upon the question; and the decision of the Court of Appeals, in *The People ex rel. Davis & Palmer v. Sturtevant* (5 Seld. 263), so fully sustains the jurisdiction, that the point here taken can scarcely be considered open for discussion. And it is proper to add, that the counsel for the corporation not only declined to present it, but expressly disclaimed it.

*Second.* It is objected that this court has no jurisdiction to restrain the police commissioners; that they are state officers, and comprise a board of state officers, and, against such, an injunction can only be granted by the Supreme Court at a general term.

In support of this view I am referred to chap. 488, Laws of 1851, p. 920. But upon reference to section two of that act, it will be seen that the words "state officers," in the sense there used, were only intended to include such as had been theretofore so denominated; and to designate those who were immediately connected with the government of the state, and in actions against whom it was the duty of the attorney-general to appear for and defend. Const. 1846, Art. 5, see marginal note to § 1; *Christman v. Floyd*, 9 Wend. 342. The police commissioners are mere local,

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district officers, and are not state officers, within the proper meaning of the term, as used in the act of 1851; consequently, in a proper case, they can be restrained by this court in the exercise of its equity powers, in the same manner, and to the like extent, as other local or county officers.

These objections having been disposed of, I proceed to the examination of the principal question:—Whether the ordinance intended to be enforced was passed in violation of previous agreements between the corporation of the city and the plaintiffs, or of the rights or franchises granted to the plaintiffs by the legislature; or without any legal authority.

The legislative power and control of the corporation of the city, over the streets and avenues within its limits, are very extensive, and the only limitation upon them is, that they shall be appropriated to no use or purpose which is not alike free and common to all citizens and travellers. Everything which tends to render the streets useful or convenient, for the purposes of travelling upon them as common public highways, is within the power of, and may be exercised by the corporation. But as converting them to railroad purposes, and permitting rail tracks to be laid upon them, to be used by an individual or an association, in the transportation of merchandise and passengers for hire, is a devotion of them to a use exclusive in its nature, and which, from its very character, cannot be alike common to all travellers; hence the legislature, in the act incorporating the plaintiffs, gave to the corporation of the city *express authority* to grant permission to the plaintiffs to construct their road across or upon the streets over which their route might be laid. *Davis v. The Mayor of N. Y.*, 4 Kernan, 506, 515, 517, 522, 524; *Milhau v. Sharp*, 17 Barb. 437; *Williams v. Central R. R.*, 16 N. Y. Rep. 97; *Attorney-General v. The Mayor of N. Y.*, 3 Duer, 119–153. Although the power to give this permission must be derived from the legislature, yet its exercise does not in any way deprive the corporation of its legislative control over the streets in all other respects, and it is entirely competent to impose, upon the parties asking permission, such restrictions as the corporation may think proper.

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in regard to the manner in which the rail track shall be used, and also such conditions as upon which the right to continue in the future use of the same may depend.

But apart from the restrictions imposed by the sixteenth section of the act incorporating the plaintiffs, and the rights expressly reserved to the corporation by the contract entered into by the plaintiffs on December 22d, 1851, upon obtaining permission to lay their track, the corporation might at any time regulate the manner of using, and the motive power to be used upon the track, whenever in its opinion the public interests required such interference or regulation.

This regulating or legislative power of the corporation over the streets partakes of the character of legislative sovereignty, originally conferred by the charter of Governor Dongan in 1686, confirmed in 1730 by the Montgomerie charter, and subsequently by legislative grants; it may well be doubted whether the city can be wholly deprived of it even by an act of the legislature itself. Certain it is, however, that the corporation cannot surrender any part of it into the hands of private individuals, or of a private corporation, without previous legislative sanction, and any attempt by it to do so, without such authority, would be utterly void. See cases cited *supra*.

In the present case, not only did the legislature abstain from authorizing the corporation to grant the plaintiffs any permission except to construct their railroad across or along certain streets and avenues of the city, but, in addition, recognized this regulating and legislative power of the corporation over its streets, by providing that, after the road should be constructed under such permission, the *time* and *manner* of using the same, and the speed with which carriages should be permitted to move on the same or *any part thereof*, should be subject to it. The plaintiffs accepted their charter with this restriction; upon obtaining permission to lay their rails they recognized it as such; and by their agreement of January 9th, 1832, bound themselves to conform to it, and all the other conditions required by them, by the ordinance of December 22d, 1831.

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But it is contended that this agreement is not binding upon the plaintiffs, because it attempted to transfer to the corporation the discretion vested in the plaintiffs, by their act of incorporation, and by which it is said that *they alone* possess the right to determine the motive power to be used on their road.

The answer to this is twofold:—1st. A party, applying to a court for the application of its equitable powers, should be held to the rule, “that he who seeks equity must do equity.” He should not be permitted to found his claim for relief upon a permission contained in a contract, while he repudiates the conditions and covenants entered into by him, and which formed the consideration upon which the permission was granted. *Linden v. Hepburn*, 3 Sand. S. C. R. 371; Willard Eq. Juris. 346.

2d. The agreement, for the reasons I have stated, was not a transfer of the corporate power of the plaintiffs. The corporation might grant or withhold its permission, and, if granted, it had the right to impose upon it such restrictions and conditions as would enable the mayor, aldermen, and commonalty to so regulate the use of the plaintiffs' road as to prevent it being an inconvenience to citizens and travellers. Besides, as before stated, the plaintiffs accepted their charter with this restriction upon their corporate power, and cannot now be permitted to complain that it turns out to be more burdensome or inconvenient than was at first anticipated.

Again: It is contended, that even admitting that the corporation originally had the power, under the act incorporating the plaintiffs, and the ordinance contained in the agreement of January 9, 1832, yet by subsequent assurances to, and agreements with the plaintiffs, and upon the faith of which the plaintiffs had incurred large expenditures, and submitted to great inconveniences, it has deprived itself of the right to interfere in any way with the plaintiffs in their present use of their road.

The answer to this is likewise twofold:—1st. There can now exist no doubt that corporations, like individuals, may be bound by implied contracts, to be deduced by inference from corporate acts, without either a vote, writing, or deed. *Ex parte Peru Iron*

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*Co.*, 7 Cowen, 540; *American Ins. Co. v. Oakley*, 9 Paige, 496; *Peterson v. The Mayor of New York*, 17 N. Y. Rep. 449. But in applying this rule we must be careful not to violate other legal principles, such as, that no act can be made valid which is without the power of the corporation, or the scope of its authority. Here, as we have seen, the corporation could not deprive itself of its legislative power over the streets, and prevent its hereafter regulating their use by all persons, including the plaintiffs; and any attempt to do so by contract, either express or implied, would not only be revocable at pleasure, but void.

2d. The papers read on this motion failed to convince me that the corporation ever entered into any such agreements as the plaintiffs claim; or that their acts were such as would lead me to infer any contract of the nature alleged. It is quite probable the plaintiffs supposed, when they arched over the trench from Thirty-third street to Forty-second street, that they had put an end to all further interference with them in the use of their steam engines above Thirty-second street; but if this act was based entirely upon such a supposition, the court cannot give any relief founded upon it, though it may have been entertained and acted upon in good faith.

Having, for the reasons stated, arrived at the conclusion that the ordinance, which the plaintiffs ask to have the enforcement of restrained, is valid, and one that the plaintiffs are bound to obey, it does not seem necessary to inquire into the reasons which actuated the mayor, aldermen, and commonalty of the city of New York in adopting it, nor would such an inquiry be proper, because courts are bound to assume that, where a discretion is vested in a municipal body, exercising functions of a legislative character, good reasons existed for the adoption of a regulation or ordinance which was the result of such a discretion. *Oneida Com. Pleas v. People*, 19 Wend. 79, 99. But, were it otherwise, it would be sufficient to say that the affidavits presented by the defendants go far to show that the use of steam engines at the plaintiffs' depot at Thirty-second street constitutes a nuisance to the neighborhood, and the constant running of

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engines across the sidewalks, and the condition of the avenue at this point, produced by the plaintiffs' acts, constitute an obstruction to its free use by our citizens to such an extent as to call for the adoption of the ordinance in question, and its enforcement by the police commissioners. These may have been the reasons which controlled the defendants in their conduct; but whether they were or were not, as I before remarked, it is not my duty to consider, having determined the ordinance in question to be within the power of the corporation to adopt, and one that the police may properly enforce.

Although upon the argument it was deemed, by counsel on both sides, necessary to inquire into the powers and duties of the board of police commissioners, and the powers of a policeman or constable, both at common law and under the broad provisions of the metropolitan police act (2 Laws 1857, p. 200), it seems unnecessary that I should follow them, after having arrived at the conclusion stated. It is enough to state that the duty of enforcing all the public ordinances of the city, and especially those which are applicable to *police or health* (§§ 5, 20), is imposed by law upon the board of police commissioners, and to add that, upon the affidavits read on this motion, the ordinance in question might very properly be classed under either head.

I have abstained from inquiring whether, under the law amendatory of the act incorporating the plaintiffs, passed March 29, 1848 (see Laws of 1848, ch. 143, p. 238), the New York and New Haven Railroad Company acquired any greater rights in respect to the use of the plaintiffs' track than is possessed by the plaintiffs, because that company is not before the court as a party to this action. But if the views I have here stated are correct, it is difficult to perceive wherein their position, under the ordinance in question, differs materially from that of the plaintiffs.

The motion for injunction is denied.(a)

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(a) Subsequently the New York and New Haven Railroad Company, upon a bill filed in the United States Circuit Court against the same defendants, applied for an injunction like the one asked for in this case. Upon the motion, substantially the

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## ROBERT L. WILLIS v. CHARLES J. WARREN.

No action can be maintained for the recovery of any gambling apparatus or device, seized by a public officer upon a charge that they are kept or used for the purpose of gambling.

A police justice, without warrant, entered the premises of Willis, and, finding several persons engaged in playing cards, arrested them on a charge of gambling, seized the gambling apparatus, and also several lewd pictures found upon the premises. The articles thus taken were placed in the custody of Warren, the property clerk of the Board of Metropolitan Police Commissioners. In an action of claim and delivery, subsequently brought against Warren, to recover their possession—*Held*, that they were in *custodia legis*, and no action would lie for their recovery. The complaint was, therefore, dismissed.

*It seems* that any person may arrest another who has committed a felony, and a justice of the peace, or constable, may also *virtute officii* arrest for any offence less than a felony, if committed in his presence.

The public exhibition of obscene pictures is an offence indictable at common law.

Such pictures are regarded as a common nuisance, and should be destroyed when the fact of publication is established.

It is the policy of the law to destroy all such articles, and the loss thus occasioned to the owner is a part of the punishment inflicted for the offence of publicly keeping or exposing them.

*At Special Term, February 8th, 1859.*

MOTION to dismiss complaint. This was an action of claim and delivery, brought to recover the possession of certain gambling apparatus and obscene pictures taken from the plaintiff's premises by Police Justice Connolly, and delivered by him to the custody of the defendant, as property clerk of the Board of Police Commissioners. It appeared that the justice, without any charge made or warrant issued, entered the plaintiff's house during his absence, found several persons engaged in playing cards, arrested them for gambling, and at the same time seized the articles in question. The sheriff having taken them from the defendant, before their delivery to the plaintiff this application

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same facts were presented. After hearing the parties, Judge Nelson, in August, 1858, denied the application.

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was made on behalf of the defendant to have the complaint dismissed, and the articles restored to his custody.

*Brown, Hall and Vanderpoel*, for the motion.

*James M. Smith, jr., and John Anderson, jr.*, opposed.

BRADY, J.—Justice Connolly, attended by others, entered the premises 581 Broadway, and there finding several persons engaged in playing cards, arrested them on a charge of gambling, as appears by the affidavit of McClelland read in opposition to this motion. It seems that in the apartment in which such persons were found at play, or on the premises, there were certain devices, or apparatus for gambling, which were seized and placed in the custody of the defendant, who is the property clerk of the board of police, created by the act passed April 15, 1857. Laws 1857, chap. 569. The plaintiff claims the apparatus so seized, and, insisting that he is entitled to have them, notwithstanding the circumstances detailed, brought this action, which is one for the claim and delivery of personal property under the Code, to obtain possession of them.

The defendant, having delivered the articles to the sheriff, moves for an order compelling their return to him, or for such order as he may be entitled to in the premises, upon the ground that they are nuisances at common law, possessing none of the attributes of property, and that no action can be brought for their recovery.

The plaintiff, in answer to this view, insists that the seizure was unlawful, because no warrant was exhibited, and that the detention of the property is unlawful, because it is a deprivation of property without due process of law. The act against gambling, passed July 10, 1851 (Laws 1851, chap. 504), and amended by the act passed April 9, 1855 (Laws 1855, chap. 214), was not referred to on the argument, but reference to it, and the act of 1857, *supra*, creating the metropolitan police, will be necessary in considering this motion.

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The twenty-fourth section of the act of 1851 provides for the seizure of any gambling device or apparatus, by warrant to be issued upon the filing of an affidavit, stating that the affiant has reason to believe that the person charged in the complaint has upon his person, or at any other place named in the affidavit, any gambling device or apparatus. It also provides for the arrest of such person, and for the detention of the property so taken, subject to the order of the court before which such offender may be required to appear until his discharge or conviction. And further, that in case of the conviction of such person, the gambling table, device, or apparatus shall be destroyed. Section twenty-five of the same act is substantially to the same effect; providing in addition, however, for the detention of the apparatus, to be produced on the trial of the offender.

The ninth section of the act of 1857 provides, that if the general superintendent of police shall report, in writing, to the board of police that there are good grounds for believing any house or room to be kept or used as a gambling house or cock-pit, and if two or more householders, dwelling within the metropolitan police district, and not belonging to the metropolitan police, shall make oath, in writing, that the premises complained of are commonly reported and believed by the deponents to be kept as a common gaming house or cock-pit, any commissioner of police may, by order in writing, authorize the general superintendent, or either deputy superintendent of police, to enter upon such premises, and take into custody all persons who shall be found therein, and to destroy all implements of gaming found therein. These statutes are not inconsistent with each other. The act of 1857 confers power upon the commissioners of police, and the act of 1851 prescribes the duties of magistrates and police justices. The seizure complained of was made, it would seem from the papers submitted, by Justice Connolly, without any interposition or interference of or by the police commissioners.

It is alleged that no warrant was exhibited at the time of the arrest and seizure, and that allegation has not been controverted. Assuming, then, that there was no warrant issued, that fact does

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not aid the plaintiff. There is no evidence that the entry of the justice and his attendants was by force; and there can be no doubt that, if, upon entering the premises, the justice was satisfied that the persons therein were engaged in gambling, he would have the right to arrest them without a warrant. Where a felony has been committed, an arrest may be made by any individual without a warrant (*Holley v. Mix*, 8 Wend. 350); and a constable may *ex officio* without warrant arrest a breaker of the peace. *Taylor v. Strong*, 3 Wend. 384.

It is said by Blackstone (4th Book, page 292), that an arrest may be made by a justice of the peace without warrant, who may himself apprehend, or cause to be apprehended, by word only, any person committing a felony or breach of the peace in his presence. The rule laid down by Chitty (1 Vol. Crim. Law, 14 [4th Am. edition]), is as follows: "Any person may, without warrant, apprehend and carry before a magistrate a party about to expose an infant and leave it to perish; or a person playing with false dice, or otherwise committing a fraud affecting the public." And again, at pages 19 and 20, "That a constable, by the original and inherent power which he possesses, may, for treason, felony, breach of the peace, and some misdemeanors less than felony, committed in his presence, apprehend the supposed offender *virtute officii* without any warrant." See also, on this subject, *Commonwealth v. Deacon*, 8 S. & R. 47; *Knot v. Gay*, 1 Root, 66; 2 Hawkins, c. 12, § 20.

From these authorities the rule deducible is, that any person may, without warrant, arrest another who has committed a felony, either at the time it is committed or subsequent thereto; and that a justice of the peace or constable, *virtute officii*, may, without warrant, not only arrest a person for a felony, but also for any breach of the peace or misdemeanor less than a felony, committed in his presence. The arrest of the parties engaged at play, as before stated, on a charge of gambling, was, therefore, legally made. When the arrest is made, the seizure of the implements is provided for by law, as we have seen, for the two-fold object of using them as evidence of the charge, and that

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they may be destroyed if conviction follow. It is the policy of the law to destroy gambling apparatus, and the loss incurred by the owner is a part of the punishment inflicted for the offence, which is considered by the law most mischievous in its consequences to society. 1 Russel, 406; Roscoe's Crim. E. 447. Although the act of 1857 provides for the destruction of gaming apparatus, it cannot be held to authorize such destruction until after conviction for the offence of gambling, in which such apparatus was employed; but the right to destroy it, and the right to detain it until after the trial of the alleged offence, is one vested in the public authorities, and is not in conflict with any provision of the constitution. Property may be taken as a punishment for an offence (see opinion of Comstock, J., illustrating this principle, in *Waynehamer v. The People*, 3 Ker. 402), but not until the offence is established by conviction. Where the offence is one which is accomplished by the use of the article forfeited, there seems to be great propriety in holding it in *custodia legis* until the charge is disposed of; and such is the power conferred, properly I think, in regard to gambling devices. The owner of the property thus held is not without a remedy. He may apply to the court, in which the charge of gambling is pending, for the restoration of the property, or he may urge his trial, and thus acquire it, if the complaint be not established. It is clear, however, that he has no remedy by action against a person holding the property as the custodian of the law, while the charge remains undisposed of:—he must await its determination. For these reasons, regarding the defendant's possession legal, and his right to such possession paramount to that of the plaintiff, I think the action should be dismissed, and the property restored to the possession of the defendant.

In regard to the lewd pictures, the conclusion must be the same, because it is an indictable offence at common law to publish an obscene book or print, and so of any offence tending to corrupt the morals of the people. Wharton Am. Cr. Law, § 2547. The public exhibition of them is an offence against society, and punishable (*Charles v. Carn*, 2 S. & R. 91), and the

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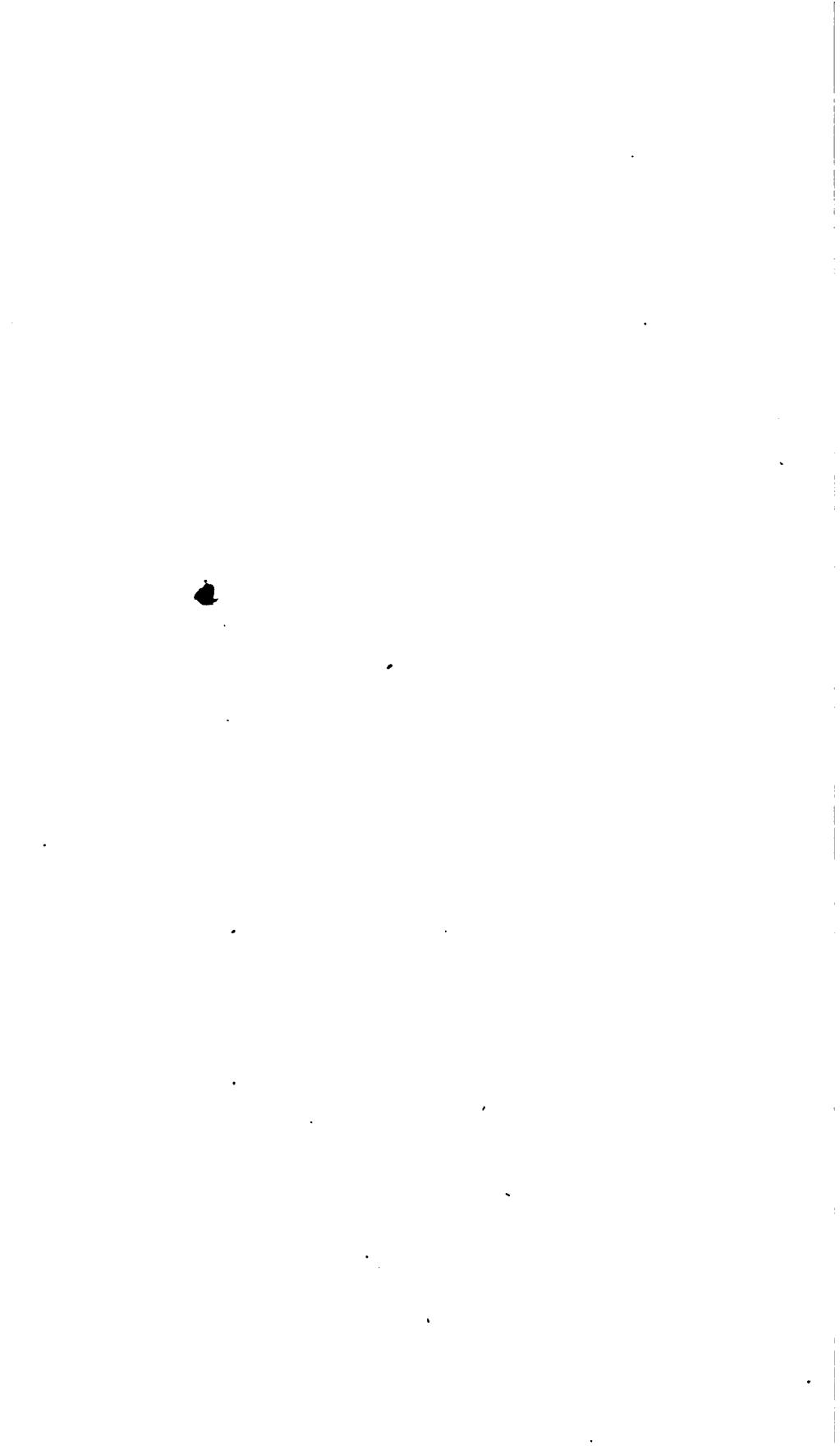
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pictures, being regarded as a common nuisance, may and should be destroyed in the administration of the law, when the charge of publication or exhibition is established.

Whether the charges made (and of which the gambling apparatus and lewd pictures are held as evidence) can be sustained or not, it is not for me to determine. That is to be done in another tribunal, and upon a very different mode of investigation. It is sufficient for the purpose of this motion, that the property sought to be recovered is properly in the custody of the law. The complaint must be dismissed.

Ordered accordingly.



# INDEX.

## A

### ABATEMENT.

1. Pleading to the merits waives all matter in abatement of the action. *Gosseling v. Broach*, 49
2. Answering in bar to the action waives all matter which might be set up in abatement. *Brown v. Jones*, 204

### ACCORD AND SATISFACTION.

1. The payment of a part of a judgment-debt, and the giving of the debtor's own notes for a part of the balance, will not, without a satisfaction or release, discharge the indebtedness, although received in full payment and satisfaction. *Moss v. Shannon*, 175

2. And it makes no difference that the notes were made payable to the attorney of the creditors, who is acting for and on their behalf, instead of being made payable to them directly. *Ibid.*

### ACTION.

1. The assignee of a tenant having devoted the demised premises to a use inconsistent with the tenant's covenant in the lease, in consequence of which the

premises became subject to the payment of a tax which constituted a lien upon the land, and the assignee of the tenant having refused to pay the tax upon demand, and the landlord having been obliged to pay it, to prevent the premises from being sold—held, that he could recover it in an action against the tenant's assignee. *Deforest v. Byrne*, 42

2. Every action should be prosecuted in the name of the real party in interest; and where the action was brought by an assignor of the original claimant, and the evidence showed that another person was to share in the proceeds of the judgment—held, that the complaint should have been dismissed, although the assignment to the plaintiff was in writing and under seal. *Lowando v. Dunham*, 114

3. The owner of a house, injured by blasting, has a right of action for the damage, against the contractor under whose supervision the blasting was done. In such a case, the fact of the accident raises a presumption that the blast was not properly covered. *Ulrich v. McCabe*, 251

4. It makes no difference that the plaintiff's house stood upon leased land, or was itself hired by him. In the latter case, he would presumptively be liable to his landlord to repair the injury, and can recover the value of the necessary repairs from the contractor. *Ibid.*

5. In an action to recover for such an injury, it is immaterial whether or not the tenant, under his agreement with the landlord, was bound to keep the premises in repair; because he must either make the repairs rendered necessary by the injury, or lose the beneficial enjoyment of the property. *Ibid.*

6. No action can be maintained for work and labor, unless the work has been actually performed. Where a party has been employed under a contract, and wrongfully discharged, his remedy is either by an action for damages for breach of contract, or for the contract price. In the former case, one recovery would be a bar to any further action. In the latter, it must appear that he was ready and willing to perform any further services that might be required under the contract. *Wiseman v. Panama R. R. Co.*, 300

7. The plaintiffs and the defendants owned respectively lots of land adjoining each other. The plaintiffs, by mistake, paid the tax due on defendants' land, and, on acquainting one of the defendants, who were joint owners of the land, with the fact, he promised that they would repay it.—*Held*, that there was a sufficient consideration to sustain the promise, and that the defendant making it was liable thereon, but not the other defendant. *Nixon v. Jenkins*, 318

8. It is settled, in this state, that an action will lie to recover back money paid upon a judgment which is afterwards reversed.

A defendant, against whom judgment had been recovered, sued out a writ of error, giving a bond with sureties for costs, &c., if the judgment should be affirmed. The judgment was affirmed by a state court, and one of the sureties paid to the plaintiff the amount due on the bond. Thereafter the judgment was reversed by the Supreme Court of the United States.

*Held*, that the surety, or his assignee, might maintain an action directly against the plaintiff in the original judgment, to recover back the sum paid.

There is a privity, arising on the bond, between the surety and the plaintiff in the judgment, sufficient to sustain the action, without putting the surety to an action against his principal, and the principal to an action against the plaintiff.

The right of action in such a case is founded upon a payment, the consideration of which having failed, an implied obligation arises, on the part of the party having received the money, to restore it to the party from whom he received it; and no equities existing between the plaintiff and the defendant could affect the right of the surety to recover back the payment.

To render a payment compulsory, in such a sense as entitles the party to bring an action to recover it back, it is not necessary that the party making it should wait till judgment has been recovered and execution issued; it is sufficient if the payment, when made, could have been compelled at law. *Garr v. Martin*, 358

9. To sustain an action upon an undertaking given on appeal, it is not necessary that an execution should have been issued upon the judgment when affirmed. The undertaking is forfeited and the liability of the sureties fixed as soon as the judgment of affirmation takes place, and the debtor makes default in its payment. *Wood v. Derrickson*, 410

10. In such an action, an answer which sets up that the defendant in the judgment owned real estate, and the execution issued was returned by the sheriff before the expiration of sixty days, at the plaintiff's request, without attempting to make the money out of the real estate, is frivolous. *Ibid.*

11. Separate causes of action, arising out of breach of contract, and injuries to property the subject of the contract, intrusted to another to enable him to perform it, may properly be joined as arising out of one transaction. *So held* upon demurrer, in a case where E. M. B., by her complaint, claimed to recover of S. W. B., for a breach of a contract to publish a book from certain stereotype plates, delivered; for the loss of the plates by S. W. B., through his gross carelessness and negligence; for the moneys advanced to him upon the contract by E. M. B.; for the damages arising from his delay in the publication, and for the additional expense over the contract price, in subsequently publishing the book. *Badger v. Benedict*, 414

12. It seems that the provisions of the

Code, for proceedings supplementary to execution, are limited to reaching property of the debtor, whether in his possession, or in the possession of others for him, and which is conceded to be his; also money due to the debtor when the order is obtained and served. But when property or money appears to belong to him, but is in the hands of others, who make claim thereto, it should be reached through a receiver. *Stewart v. Foster*, 505

13. No action can be maintained for the recovery of any gambling apparatus or device, seized by a public officer upon a charge that they are kept or used for the purpose of gambling. *Willis v. Warren*, 590

14. A police justice, without warrant, entered the premises of Willis, and, finding several persons engaged in playing cards, arrested them on a charge of gambling, seized the gambling apparatus, and also several lewd pictures found upon the premises. The articles thus taken were placed in the custody of Warren, the property clerk of the Board of Metropolitan Police Commissioners. In an action of claim and delivery, subsequently brought against Warren, to recover their possession—held, that they were in *custodia legis*, and no action would lie for their recovery. The complaint was, therefore, dismissed. *Ibid.*

See ARREST, 1.

ASSIGNMENT, 4.

CHATTELS, 1.

COMMON CARRIER, 9.

CCompromise, 1, 2.

CONSTABLE, 2.

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CORPORATIONS, 2.

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RESCISSON, 1.

SUPPLEMENTARY PROCEEDINGS, 5.

USE AND OCCUPATION, 4.

#### ADMISSIONS.

1. As a general rule, the admission of one defendant in tort is not admissible against his co-defendants, where the action is for the negligence of one of the de-

fendants; *e. g.*, against master and servant for the negligence of the servant. But such admission is competent against the defendant making it; and it may be proven if a part of *res gesta*. And where the subject matter of the admission is afterwards clearly proved by independent testimony, the judgment will not be reversed, because proof of the admission was received. *De Benedetti v. Mauchin*, 213

2. The execution of an instrument, not under seal, may be proved by the admission of the party, although the instrument is attested by a subscribing witness, who is not called, or his absence excused. *Giberton v. Ginochio*, 218

3. Where, in an action for goods sold and delivered to defendant, upon his written order, the plaintiff proved an admission by the defendant, that the signature to the order for the goods was ~~his~~, but it appeared that the defendant, at the same time, added that the goods were delivered on a credit which had not expired—held, that the whole admission must be taken together.

There being no testimony in the case, but the defendant's admission, to charge him as drawer of the order, a judgment for the plaintiff was reversed as against evidence. *Perego v. Purdy*, 269

4. The general rule in such cases is, that the whole of the admission must be taken together; and if there is no evidence in the cause which contradicts the part which discharges the defendant's liability, that portion cannot be disregarded. Part cannot be taken and part rejected. *Ibid.*

See EVIDENCE, 2, 3, 12, 13, 14.

SALE AND DELIVERY OF CHATTELS, 1.

#### AGENT.

See PRINCIPAL AND AGENT.

#### AGREEMENT.

See ACTION, 7.

ASSIGNMENT, 3.

CONTRACT.

COMMON CARRIER, 1, 2, 8.

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STATUTE OF FRAUDS, 4.

## ALIEN

See PRACTICE, 1, 2.

## AMENDMENT.

1. Leave to file a supplemental complaint will not be granted where the object can be accomplished by amendment. *McMahon v. Allen*, 103

See APPEAL, 4, 45.  
FALSE IMPRISONMENT, 2,  
TRADE MARK, 2.

## ANSWER.

See PLEADING.

## APPEAL.

1. Upon an application to open a default in the Marine Court, the applicant must establish that injustice has been done him by the default. It is not enough that his affidavit shows a defence, if the allegations are denied by the affidavit of the plaintiff. In such cases the appellant must furnish, in addition to his own affidavit, proof by some other person of the truth of his defence. *Forsier v. Capewell*, 47

2. Whether the failure of the defendant to hear his case called, although he was in attendance at the court-room at the time, is a sufficient excuse for the default—*quare?* *Ibid.*

3. When the necessary papers upon the appeal are not submitted to the court, the appeal will be dismissed. So held, where the papers did not show whether the appeal was taken from a judgment upon a demurrer, or from an order striking out a demurrer as frivolous. *Sun Mutual Insurance Co. v. Dwight*, 50

4. The refusal of a justice to allow an amendment of a pleading, if in any case a ground of appeal, can only be so when no injustice would result from granting the application. Where a motion was made upon the trial to amend an answer, so as to add a new defence—held, that it was properly refused by the justice. *Tattersall v. Hase*, 56

5. Objection to questions as leading

should specify the ground of the objection, so that the form of the question may be altered accordingly—otherwise the objection will not be considered upon appeal. *Ibid.*

6. In an action by several plaintiffs, as partners, for goods sold and delivered, the defendant cannot avail himself on the appeal, of the objection, that they omitted to prove their partnership, if he allowed the omission to pass without objection on the trial. *Whitlock v. Buena*, 72

7. A notice of appeal should specify, with distinctness, the errors alleged to have been committed by the court below, to rectify which the appeal has been taken. A general statement, "that the judgment is unsustained by, and contrary to, law and evidence," is insufficient. *Kelty v. Jenkins*, 73

8. Where a justice of a district court enters judgment for an amount less than that found by him to be due, although through inadvertence, this court cannot give the proper judgment, but can only reverse, and allow a new action to be brought. *Hardy v. Seelye*, 98

9. This court cannot, on reversing the judgment of a justice's court, preserve the testimony of a witness who has left the state since the former trial, and whose testimony cannot be again procured. The power of the court is exhausted upon a reversal, except where the judgment appealed from is entered by default, which is the only case wherein a new trial may be ordered. *Morris v. Bleakley*, 98

10. This court will not reverse the finding of a referee upon a question of fact, although it differs from him in the result at which he has arrived, if there is conflicting evidence upon the point. *Thompson v. Wood*, 93

11. Parol proof of the contents of a chattel mortgage having been given upon the trial without objection—held, that the objection could not be taken upon appeal. *Gelhaar v. Ross*, 117

12. A judgment of the Marine or Justice's Court will be reversed when the suit has been commenced by short summons, and there is no proof returned to this court of the defendant's non-residence. *Davidson v. Hutchins*, 133

13. On appeal from the Marine or Justice's Court, this court can look only at the return of the justice, and will not review matters resting in the discretion of the court below, or questions of practice merely, unless they affect the substantial rights of the parties, and are returned by the justice as part of the proceedings in the cause. *Mitchell v. Menzie*, 142  
livered, is not an appealable order. *Ubedell v. Root*, 178

14. The court has the power to set aside a verdict, and order a new trial on the ground of excessive damages, even in an action for a mere personal tort, as in an action for an assault and battery, where, upon a comparison of the verdict of the jury with the facts established before them, it appears that they acted under undue motives, or some gross error or misunderstanding. *Blum v. Higgins*, 147

15. But to justify such an interference with the verdict of the jury, the case must be very gross and the recovery enormous. *Ibid.*

16. \$500, held not so excessive, under the circumstances of this case, for an assault and battery and false imprisonment at sea, as to call for the interference of the court. *Ibid.*

17. Where no notice of appeal is attached to the return, on an appeal from a district court, the appeal should be dismissed. *Cabre v. Sturges*, 160

18. The court will not consider an objection presented on appeal, which, if taken at the trial, might have been obviated by the respondent. This rule illustrated and applied. *Hunt v. Hoboken L. & I. Co.*, 161

19. The court will not, on a question of fact, disturb the finding of a jury, unless clearly against the weight of evidence. *Ibid.*

20. A judgment of this court, on appeal, reversing a judgment of the Marine, or a district court, for the plaintiff, not predicated on the merits of the controversy, is no bar to another action for the same cause. Its effect is merely to remit the parties to their original rights and obligations. *Ibid.*

21. An order to refer a cause, brought upon an account for goods sold and de-

22. When a party has proceeded, under an order of reference, with the trial of the cause before the referee, he cannot afterwards appeal from the order. *Ibid.*

23. The admission of immaterial evidence at the trial forms no ground for a reversal of the judgment, when it can be seen that no harm resulted from its admission. *Moore v. Somerindyke*, 189

24. Objections stated on the argument of appeal cases, but not contained in the notice of appeal, will not be considered. *Ibid.*

25. After the decision of an appeal, by the court in *banc*, the unsuccessful party cannot be allowed, for the purpose of an appeal to the Court of Appeals, to insert exceptions not appearing in the *causa*, upon which the appeal in this court has been argued and decided. *Beach v. Raymond*, 201

26. Where the subject matter of an admission is afterwards clearly proved by independent testimony, the judgment will not be reversed, because proof of the admission was received. *De Benedetti v. Mauchan*, 218

27. In an action for personal injuries, which incapacitated plaintiff from pursuing his business, a witness for plaintiff was asked what amounts other persons in the same employment usually earned, and he named several sums, adding that the plaintiff earned the same amount—held, that the evidence of the earnings of other persons, though improper, could not have done harm, there being positive testimony to the individual earnings of plaintiff. *Ibid.*

28. This court will review the decision of a justice of a district court, denying a jury trial, although no exception to the decision was taken. *Meech v. Brown*, 257

29. An original summons in a district court, made returnable at 9 o'clock A. M., and having been returned by a constable personally served, a judgment entered thereon by default is regular, and cannot be impeached upon appeal to this court by affidavits showing the copy summons, served upon the defendant, to have been

made returnable at 10 A. M. If the constable did not serve a copy of the summons upon him, he must seek his remedy by an action against the constable for a false return. The return cannot be impeached or brought in question on an appeal from the judgment. *Haughry v. Wilson*, 259

30. The mere entry by the justice on the summons, of an adjournment of the cause, upon the defendant's default, does not render it irregular for him to proceed to try the cause, and render judgment prior to the adjourned day, the defendant not having appeared in the mean time. *Ibid.*

31. This court will not, upon appeal, set aside a regular judgment entered on default in a district court, although the defendant excuses his default, and swears to a defence, if the ground of appeal, as specified in the notice, is simply for error in the judgment, not for relief upon the merits. *Ibid.*

32. Whether the justice of a district court may open a judgment rendered by him on default through mistake—*quare invito*. *Scranton v. Levy*, 261

33. But if it be opened by consent of the parties, and the cause tried upon its merits, and on such trial a similar judgment rendered, it will not be deemed irregular, where it can be seen that the evidence justified the conclusion arrived at by the justice; and the power of the justice to open the default and proceed with the trial will not be inquired into on the appeal therefrom to this court. *Ibid.*

34. On the hearing of an appeal from a district court, the return of the justice cannot be contradicted or impeached by affidavit. It is conclusive in respect to the statements contained in it. If it is erroneous, it can only be corrected by a motion to the court. *Spence v. Beck*, 276

35. An appeal will be entertained from an order granting judgment on account of the frivolousness of a demurrer, taken before the entry of judgment thereon. *Lee v. Atwells*, 277

36. This court will not interfere, on appeal, with the finding of a justice, unless it is such an obvious disregard of the weight of evidence as to create a conviction

that it must have proceeded from passion, prejudice, corruption, or palpable mistake. *Tracy v. Hartman*, 350

37. The justice returned that the testimony of two of the defendant's witnesses was given in a manner to deprive it of any weight, and this court refused to disturb the judgment, although, from the testimony returned, it probably would come to a different conclusion, as to the facts, from that arrived at by the justice. *Ibid.*

38. Where a judgment is reversed, upon appeal, at the general term of the Marine Court, for errors occurring upon the trial before a single judge, or for insufficiency of proof, a new trial should be awarded. *Irwin v. Lawrence*, 352

39. It is only in cases where the facts involved in the action are ascertained at the trial, either by special verdict, or in some other proper mode, that a final judgment may be given, at the general term, in favor of the party appearing to be entitled thereto, and adverse to the judgment appealed from. *Ibid.*

40. Leave to appeal to the Court of Appeals, from a judgment of this court, in an action commenced in an inferior court, will only be granted where the case involves great interests, or settles a principle of law affecting the decision of numerous other cases. *Jackson v. Purchase*, 357

41. The notice of appeal from a judgment of a district court must itself specify the grounds of objection to the judgment. A reference to the proceedings on the trial, as the place where the grounds of appeal will be found, is not sufficient.

Errors in a complaint, although such as to be good grounds of objection if taken at the trial, do not justify a reversal of the judgment, when they are supplied by the evidence, and no harm has been occasioned by them. *The Mayor, &c., of N. Y. v. Green*, 393

42. On appeal, under § 366 of the Code, from a judgment of a district court, taken by default, the allegation of the defendant, that he is ignorant of law proceedings, is not a sufficient excuse for his non-attendance at the time and place mentioned in the summons served upon him.

Nor is his mere general denial of the allegations in the complaint sufficient evi-

dence that injustice has been done him. If the defendant wishes to obtain a new trial, in such a case, he must point out the mode in which injustice has been done.

*Ibid.*

43. Where a cause, pending in a district court, was adjourned to the 19th, and on the 18th the plaintiff appeared before the justice, and represented to him that the cause had been adjourned to that day, and the justice (his own entry of the adjournment being indistinct) allowed the plaintiff to take an inquest, and rendered judgment in his favor—*held*, that the judgment must be reversed, for error in fact.

The affidavits of the parties being in conflict as to whether the adjournment was made to the 18th or to the 19th—*held*, that the return of the justice must govern upon that question. *Kelly v. Brower*,

514

44. Upon appeal from a judgment rendered by default in a district court, the justice's return showed that the summons and complaint, verified, were returned by a constable of the city, duly served, and that, the defendant not appearing on the return day, judgment was rendered for the plaintiff for the amount claimed, without further proof. The complaint was neither set out in the return nor referred to as annexed. *Held*, insufficient.

Where judgment is rendered in a district court without proof, and on default, upon a constable's return of the personal service of a summons and complaint, the statute must be strictly complied with. The justice's return, in such a case, should show that a copy of the complaint was served, verified by the party pleading, or his agent or attorney, as the case may be. A mere return that the summons was served with the complaint is not sufficient. And the return should either set out the complaint served, or, if it is annexed thereto, should refer to it as the complaint upon which judgment was rendered. *Spring v. Baker*,

526

45. No appeal lies from an order at special term refusing leave to amend, unless a certificate of the judge making the order is obtained, pursuant to the rule of this court, adopted 22d March, 1851. Applications for leave to amend are in all cases addressed to the favor of the court. *Halford v. Secor*,

535

46. Upon appeal from the Marine or

District Court, the appellant must distinctly specify in his notice of appeal the errors alleged, whether in the process, pleadings, proceedings at the trial, or in giving judgment, that his adversary, the justice, and also this court, may be fully apprised of the matter intended to be the subject of review. *Lee v. Schmidt*, 537

47. Where the errors are not distinctly pointed out in the notice, or where the notice states generally, as a ground of appeal, that the judgment is against law and evidence, specific objections will not be heard on the argument, but the judgment will be summarily affirmed.

A statement in the notice, that the judgment is against the weight of evidence, is not sufficient to justify its review as being contrary to evidence, or against evidence, each being a distinct ground of error, and, if rolled on, must be stated.

*Ibid.*

48. A judgment will not be reversed where the cause was tried upon the assumption of the existence of a fact which was not proven, but which was incumbent on the plaintiff to have shown, and might have been established if objection had been taken at the trial. Nor will a judgment be reversed for defect of proof, when, if objection had been taken at the trial, it could or might have been obviated.

*Ibid.*

49. In an action to recover damages for the unlawful detention and conversion of certain personal property, it did not appear by the return that any evidence whatever was offered tending to show that the defendant detained or converted the property. No objection to this defect of proof appeared to have been taken at the trial.

*Held*—I. That the defendant would not be permitted to present such an objection upon the appeal:

II. That, as the notice of appeal only alleged, as ground for reversal, that the judgment was "contrary to the clear and decided weight of evidence," he must be confined to the objection stated.

*Ibid.*

50. Upon appeal from a district court, the appellant is limited to the grounds of appeal stated in his notice. Where none are stated the judgment will be affirmed. *Davis v. The N. Y. & Erie R. R. Co.* 543

51. Formal and preliminary objections.

not involving the merits of a motion, will not be considered upon appeal, unless it affirmatively appears that they were taken and overruled, when the motion was brought on for a hearing. *Merritt v. Thompson*, 550

52. In an action brought against the firm of the name of I. K. & Brothers, M. K. was, by mistake, named as defendant instead of H. K. Although no summons or complaint was ever served upon him, he appeared and answered, denying that he was a partner in the firm. The plaintiffs then moved for leave to discontinue against him without costs, and to substitute the name of H. K. for that of M. K., wherever it occurred in the summons and complaint. On appeal from the order granting the application—*held*,

I. That the order rested in the discretion of the court, and was not appealable.

II. That the circumstances of the case fully warranted the order as granted. *Waverley Manuf'g Co. v. Krause*, 560

See **DEFAULT**, 1.

**EVIDENCE**, 17.

**EXCEPTIONS**, 4.

**INFANTS**, 1.

**JUSTICES' COURT PRACTICE**, 10,  
11, 12, 17, 22, 28.

**NUISANCE**, 4.

**PRACTICE**, 5.

**REFERENCE**, 1, 2, 3, 4.

**VERDICT**, 1.

**WARRANTY**, 1.

#### ARBITRATION.

1. The president and two of the trustees of a corporation signed an agreement submitting a controversy, in which the corporation was interested, to arbitration; and all the trustees attended before the arbitrators, and took part in the trial of the controversy as witnesses, &c. *Held*, a sufficient submission to bind the corporation by the award.

The assent of a corporation to a submission may be inferred from circumstances. *Isaacs v. The Beth Hamedash Society*, 469

2. Where the submission of a controversy to arbitration provided that the decision of "a majority" of the arbitrators should be binding, and the bond provided that the award should be subscribed "by the said arbitrators"—*held*, that the sub-

mission and bond must be taken together, and that an award signed by two of the three arbitrators was valid. *Ibid.*

3. The parties, to a controversy submitted to arbitration, their witnesses, and the arbitrators chosen, were all of the Jewish persuasion. The meeting of the arbitrators for the trial of the cause was held on Sunday, and the award was on that day drawn up and signed; but it was dated the next day, and was not until then delivered to the parties. *Held*, that the award was valid. *Ibid.*

#### ARREST.

1. I. loaned to G. \$1,000, taking, to secure the repayment thereof, his note therefor, and eleven receipts, signed by G.'s wife, for eleven consecutive monthly payments of £15 each, payable to her by J. G. K. & Sons, in monthly installments, out of moneys constituting a part of her separate estate. Before the first of these payments became due, G. forbade J. G. K. & Sons to pay the amounts to I., and thereafter drew them out, as they became due, himself.

*Held*, that in an action by I., to recover the \$1,000 from G., the latter could not be arrested.

I. He had not removed or disposed of his property with intent to defraud his creditors. The moneys thus drawn out by him were not his property. His creditors had no claim thereon, nor could they be applied to the payment of his debts. They were the separate property of his wife, and the fact that the defendant drew them from the banker authorized to pay them on her receipt, could not, in any aspect, be regarded as a fraudulent removal or disposition of his property.

II. Nor did the defendant's withdrawal of the money, intended as a security for the repayment of the loan, show that the debt was fraudulently contracted. The receipts given by the wife, she had the power to countermand. The husband had no authority to bind the wife by his agreement, and the plaintiff could not allege that he had been defrauded by relying upon such an agreement. *Isaacs v. Gorham*, 479

2. It seems that any person may arrest another who has committed a felony, and a justice of the peace, or constable, may also, *virtute officii*, arrest for any offence

less than a felony, if committed in his presence. *Willis v. Warren*, 590 an assignment for the benefit of creditors, and was void because it appropriated only a specified property, and not the whole of the debtor's estate.

## ASSAULT AND BATTERY.

See APPEAL, 14, 15, 16.

LANDLORD AND TENANT, 4, 5.

## ASSIGNMENT.

I. Assignees in trust for the benefit of creditors cannot assign a claim due to them, as trustees, to a third person to collect the claim, and appropriate the proceeds in accordance with the provisions of the original assignment. The assignment devolves a personal trust upon the assignees which they cannot thus delegate to others. *Small v. Ludlow*, 189

2. Nor does it help such an assignment that the *cestui que trusts*, under the original assignment, who will, probably, absorb the entire proceeds, have joined in the assignment of the claim, and assented thereto, unless all the creditors of the original debtor have joined therein. When a debtor assigns property for the benefit of his creditors, they are all interested in the estate thus appropriated, and no diversion can be made of the trust thus created, nor any delegation of any power conferred, without their assent, or the sanction of some tribunal possessing the power to allow such diversion or transfer. *Ibid.*

3. A written instrument, for the payment of money upon a contingency, may be transferred by delivery merely, although drawn payable "to order."

Such an instrument is not negotiable, and no indorsement is requisite to transfer the title. A delivery, with intent to vest in the party claiming under it all the payee's interest in it, is sufficient. *Lofthus v. Clark*, 310

4. A. W., being insolvent, assigned a stock of goods to G., one of his creditors, for \$1,000, upon condition that G. would deduct his claim therefrom, and pay the balance to the other creditors. G. sold the property to S. W. upon the same terms—the latter, however, agreeing to pay the balance to the creditors of A. W. only in case they would accept it in full, and discharge A. W. *Held*—

I. That this sale was to be regarded as

an assignment for the benefit of creditors, and was void because it appropriated only a specified property, and not the whole of the debtor's estate.

II. That the balance in the hands of S. W., after the payments of the claim of G. and some others, was to be regarded as money had and received to the use of A. W.'s creditors, and could be recovered by them from him.

III. But that no action could be maintained therefor by a receiver of the property of A. W., appointed on the application of one of his judgment-creditors. Neither A. W., nor any one claiming under him, had any right of action against S. W. therefor. (a) *Smith v. Woodruff*, 462

5. Where a lease of land is made upon any condition—such as the payment of rent—the condition is annexed to the land, and goes with it, and the assignee of the lessee, if he accepts the assignment, takes the estate subject to the condition, and is liable for the payment of the rent as long as he continues assignee.

It seems this liability is at an end when he assigns to another, even though he assigns to an irresponsible person for the express purpose of avoiding future liability. *Journeay v. Brackley*, 447

6. But there is a distinction between an express or specific assignment, by a lessee, of his interest in a lease, and an assignment made by him of all his property for the benefit of creditors. In the former case, the assignee, by accepting the lease, creates a privity of estate between himself and the lessor, and having established that relation, it is immaterial whether he enters upon and enjoys the land or not. But in the case of a general assignment for the benefit of creditors, although the assignees accept the assignment, and enter upon the execution of the trust, whether they will become assignees of a lease, held by the insolvent at the time of the assignment, is altogether at their election.

Such an election must be signified by some unequivocal act. Either the lease must be specifically mentioned in the assignment, or the assignees, after accepting the trust, must have acted in such a way, in respect to the leasehold premises, as to show that they have elected to take the interest which the insolvent before had

(a) See, contra, *Porter v. Willistone*, 4 Seld. 162.

therein. It will not be implied from the mere acceptance of a general assignment.

*Ibid.*

7. The assignees for the benefit of creditors have a reasonable time to ascertain whether the lease can be made available to creditors or not, and during that time may take such steps as they may consider necessary for the purpose of making the property productive. What is a reasonable time for that purpose, considered?

*Ibid.*

8. It seems that the same principles apply to executors in respect to a deceased's estate.

*Ibid.*

9. What facts are sufficient evidence of an intention on the part of the assignees in such a case to accept the lease, considered; and numerous cases upon the question collected and examined.

*Ibid.*

10. J. leased to T. & R. a store for a term of years. Pending the lease, T. & R. failed, and made a general assignment of all their property, including a stock of goods in the store, to B. & U., who took possession, notified J. that they did not intend to take the building, and would have nothing to do with the lease; but remained there for thirty-six days, selling the insolvent assignor's stock—part of it at private sale, and part of it at auction. At the end of that time, and before the quarter's rent became due, they vacated the premises, and J. retook possession and collected rent from some under-tenants of T. & R., occupying a part of the demised premises. *Held*—

I. That these facts did not show an election on the part of B. & U. to become assignees of the lease, so as to render them liable for rent. Such an entry upon the demised premises for the purpose of disposing of the insolvent's effects, accomplished in an expeditious and summary manner, is no evidence of an election on their part to accept and make use of the lease.

II. That no action could be maintained against them, on these facts, for use and occupation. The leasehold estate remained in T. & R., the insolvent assignees. The privity of estate had never been changed; and T. & R. were in legal possession under a valid subsisting lease, the occupation of B. & U. being solely by their permission and authority.

*Ibid.*

11. A contract between the parties, either express or implied, is essential to maintain the action for use and occupation; and there can be no implied contract between the owner and the occupant, where a lease from the owner to a third party is shown to be outstanding. Unless the occupant is the assignee under that lease, there is neither privity of estate nor of contract to support an action against him by the owner, for rent. *Ibid.*

12. Whether a claim for a balance of account, on a settlement of partnership affairs, is assignable. *Quare per Dali, First Judge. Spring v. Baker,* 526

See BANKS, 2.

COUNTER-CLAIM, 8, 9.

LANDLORD AND TENANT, 6, 7, 8.

LEASE, 4 to 8.

MARRIED WOMAN, 3.

MERGER, 1.

SET-OFF, 1.

SURETY, 4.

#### ASSUMPSIT.

See ACTION.

#### ATTACHMENT.

1. An attachment against a non-resident debtor, issued from a district court, should be signed and issued by the clerk—it being the process by which the action is commenced. If issued and signed by the justice, he acquires no jurisdiction to proceed in the action commenced by it. *Osterlock v. Lent,* 158

2. Upon judgment being given for the defendant, in an action commenced by attachment in the Marine Court, he is entitled to an immediate return of all property taken from him by virtue of the attachment. And his right to such return is in no way suspended or affected by the plaintiff appealing from the judgment. *Moore v. Somerindyke,* 199

3. In a subsequent action by the defendant in the attachment to recover from the officer the property taken by him under it, it is no defence that the property in question has not been paid for by the defendant thus claiming its return. *Ibid.*

See CONSTABLE, 2.

## ATTORNEY AND CLIENT.

See Costs, 3.

## AWARD.

See ARBITRATION.

## B

## BAGGAGE.

1. The cases reviewed wherein *formerly* a plaintiff was permitted to testify in support of his claim for lost baggage. *Garvey v. Camden and Amboy Railroad Co.*, 280

2. The provisions of the general railroad law of this state, passed in 1850, respecting actions for the recovery of lost baggage, do not apply to foreign corporations, but are limited to companies formed under that law. *Ibid.*

See COMMISSIONERS OF EMIGRATION, 1. COMMON CARRIER, 14, 15.

## BAIL.

1. Bail are entitled to be discharged upon the death of their principal, and they have, themselves, an undoubted right to make the motion for such discharge. *Merritt v. Thompson*, 550

## BANKS.

1. It is not necessary that a witness should be an expert in banking in order to prove a usage of banks. If he knows the usage he is competent to testify to it, whether he is a banker or employed in a bank, or is accustomed to deal with banks. *Griffin v. Rice*, 184

2. A bank has a right to pay notes or checks for a dealer at his request, even after he has made a general assignment for the benefit of his creditors, until notice of such assignment is given to it. *Ibid.*

3. And such a payment is good as a set-off in an action by the assignee against the bank, for a balance of account due the assignors at the time of the assignment,

upon collaterals left with notes for discount. *Ibid.*

4. A direction in a note, making it payable at a given bank, is equivalent to a request to the bank to pay it. *Ibid.*

## BILLS OF EXCHANGE.

See PROMISSORY NOTES AND BILLS OF EXCHANGE.

## BOND

See CONSTABLE, 3. PROMISSORY NOTES, 18.

## BROKERAGE.

I. B. applied to V. L. & Co., brokers, to procure a loan of \$9,000. They introduced him to S., another broker, who in turn introduced him to St. J., who offered him a loan of \$7,000. This he agreed to take, but subsequently, finding it insufficient for his purposes, declined it. & thereafter procured another loan for him, for which he paid a commission.

*Held*—L. That V. L. & Co. could recover a reasonable compensation for procuring the loan of \$7,000, S. having told B., the defendant, that he, S., had nothing to do with the commission on that loan, but would settle with V. L. & Co.

II. That evidence of conversations between S. and B. was inadmissible, unless confined to conversations showing a payment to S. for the commissions on the first loan.

III. That parol evidence, that a receipt was given by S., which was intended to cover both loans, was inadmissible, and was properly excluded. The receipt should have been produced. *Van Lien v. Byrnes*, 133

2. Where no custom is shown, a broker, like any other person who performs services for another, is entitled to compensation: and it is immaterial whether his services proved beneficial to the party who employed him or not. If he has fully performed what he was employed and undertook to do, he is entitled to be remunerated. *Ibid.*

3. In an action to recover for services as broker, in selling land of defendant, it

appeared that the purchaser saw the lot with the defendant's name posted upon it, and upon an adjoining lot the name of the plaintiff's assignor, who is a broker. He took down the address of both; and calling first upon the broker, the latter, without any authority, offered to sell him the lot in question. The broker subsequently procured authority from the wife of defendant to sell the lot for \$5,000; but, before he had any further negotiation with the purchaser, the latter negotiated a purchase from the defendant himself at \$4,500.

*Held*, that the broker had done nothing to entitle him to any commissions. *Cushman v. Cori*, 356

4. To enable a broker to recover from a vendor of real property commissions upon the sale, he must show not only an agency in effecting the sale, but also that he was employed by the vendor to negotiate it. *Goodspeed v. Robinson*, 423

5. Where, in an action by a broker against a vendor of real property, the only evidence was, that plaintiff negotiated the sale, that the contract was drawn up and signed in the plaintiff's office, the defendants being present at the time, and that the defendants had stated to plaintiff that he must get his commissions from the purchaser—*held*, that there was no evidence of an employment of plaintiff by defendants, and that a judgment in favor of plaintiff for commissions was erroneous.

*Ibid.*

## C

### CASE.

See EXEMPTIONS, 2, 3.

### CHATTELS.

1. The owner of personal property, not in his possession, may transfer his right thereto to another, who may, on demanding possession of it, recover its value in an action, if the demand was not complied with. But such a demand is essential to give a right of action. *Van Hassell v. Borden*, 128

2. No action can be maintained by an

owner or a chattel, when the assignment under which he claims transfers the property only, except for a conversion of the chattel subsequent to such assignment. *Duell v. Cudlipp*, 166

3. And when the transfer or assignment is made to the plaintiff after the property has passed out of the defendant's possession, a demand of it by the plaintiff from the defendant, and a refusal on his part to give it up, because he had actually parted with its possession to the person from whom he received it, does not constitute a conversion. *Ibid.*

4. In an action to recover damages for the conversion of personal property by the assignee of the original owner, the complaint must either show an assignment to the plaintiff of the original owner's claim for damages, or an assignment of the property and a demand thereof by the plaintiff subsequent to the assignment. *Sherman v. Elder*, 178

See ASSIGNMENT, 4.

HUSBAND AND WIFE, 1, 3.

LIEN, 1, 2.

MORTGAGE OF CHATTELS.

PLEDGE, 1, 2.

SALE AND DELIVERY OF CHATTELS.

TENDER, 3.

WARRANTY, 1.

### CHECKS.

1. The production of a check, drawn payable to "bearer," upon the trial, is sufficient *prima facie* evidence of title, to enable the plaintiff to recover upon it. *Townsend v. Billings*, 363

See BANKS, 2.

### COMMISSIONERS OF EMIGRATION.

1. S., an emigrant, arriving in New York, was, under the rules of the Commissioners of Emigration, placed on board a barge with his baggage, for the purpose of being landed. The barge belonged to, and was in the custody of, certain railroad companies, who had ticket offices in Castle Garden, the premises of the Commissioners of Emigration. Upon landing, the baggage was transferred to the wharf by the employees of the railroad companies,

in whose charge it was left for the purpose of being weighed and marked, while S. was required to enter Castle Garden in order to have his name registered, pursuant to the rules of the commissioners. During S.'s absence for this purpose, his baggage was lost.

*Held*, that the Commissioners of Emigration were not liable therefor. The baggage was not in their charge, nor in the charge of any one in their employ. The remedy of S., if any, was against the persons in charge of the baggage, or their employers, the railroad companies. *Senler v. Commissioners of Emigration*, 244

#### COMMISSIONS.

See **BROKERAGE**, 1, 2, 3.  
**USURY**, 1.

#### COMMON CARRIER.

1. An agreement to forward goods, marked for a particular destination, is discharged by shipping them, by the usual or most direct conveyance, to the place designated. *Kreuder v. Woolcott*, 223

2. But it is otherwise on an agreement to forward them to the place of their destination, the charge for freight for the whole distance being fixed and specified in the agreement. In such case, the parties making it are liable as common carriers for the safe carriage and final delivery of the goods at the place of their final destination, although it is at a point beyond the usual terminus of the carrier's route. *Ibid.*

3. A common carrier, having received goods for transportation, and given a bill of lading therefor, specifying the name of the consignee to whom the goods are to be delivered, is responsible for the safe delivery of the goods, and, if necessary for that purpose, is bound to see that they are properly marked. *Ibid.*

4. The liability of a common carrier, for injuries to goods, is limited to such injuries as are sustained while the goods are in his possession. He is not liable for injuries occurring after they have passed to the custody of others, beyond the route for which he is by law permitted to transport them, nor for such as occurred before they came into his posse-

sion. *Hunt v. N. York & Erie R. R.* (U., 228

5. When goods are delivered to a carrier for transportation beyond the terminus of his line, and they are there delivered to another carrier to be forwarded, the latter is not liable for any damage to the goods, except upon proof that the injury occurred while they were in his custody. And it makes no difference that he received freight as agent for the other lines in addition to his own charges for transportation. *Ibid.*

6. The New York and Erie Railroad Company received goods for transportation directed to a point beyond the terminus of their route, and known to be so by the shipper. At the time of receiving them, the agent of the company told the shipper that it would be unnecessary for him to have any one at the terminus to receive the goods, but that they would be shipped right through to the place of their ultimate destination. There being no evidence that the company received, or agreed to receive, freight for the entire distance—*held*.

I. That the company were not liable, as common carriers, for the safe carriage and the delivery of the goods at their final destination. They were liable, as common carriers only, to the terminus of their road, and thereafter their liability was that of forwarders.

II. That their duty as forwarders was fulfilled by their delivering the goods at their terminus to a transportation line engaged in transporting merchandise to the place to which the goods were directed. *Dillon v. N. Y. & Erie R. R. Co.*, 231

7. The difference between common carriers and forwarders considered, and their respective duties and liabilities compared. *Ibid.*

8. W. shipped 144 barrels of potatoes by the B. C. & N. Y. R. R. for New York, paying them the freight for the entire distance. The potatoes were delivered by that company to the N. Y. & E. R. R. Co. at C., to be transported to New York by them. While in their custody and on the deck of a barge in the North River, they were frozen.

*Held*, that the N. Y. & Erie R. R. Co. were liable to the owner for the injuries occasioned to the potatoes by freezing. *Wing v. The N. Y. & Erie R. R. Co.*, 235

9. An action can be maintained by the owner of goods, against a carrier, in whose custody they are injured, although there is no privity of contract between the owner and the carrier, and notwithstanding the contract was, in fact, made between the carrier and another carrier, who undertook the carriage of the goods for the whole distance, and received freight therefor. *Ibid.*

10. The freezing of perishable articles, by reason of an unusual intensity of cold, is not such an intervention of the *vis major* as excuses the carrier, if the accident might have been prevented by the exercise of due diligence and care on his part. *Ibid.*

11. The fact, that the carrier has done what is usual, is not sufficient to exempt him from a charge of negligence. He must show that he has done what was necessary to be done under all the circumstances. *Ibid.*

12. In an action against a common carrier, to recover the value of a trunk and contents intrusted to him by a passenger, it is not necessary to show a demand of the trunk and a refusal by the carrier to deliver before suit brought, where it appears on the trial that the trunk has been lost. In such a case, proof of delivery and loss is *prima facie* sufficient to entitle the plaintiff to recover. *Garvey v. Camden and Amboy R. R. Co.* 280

13. A common carrier has the right to exact payment in advance for his services, and if the person who employs the carrier pays the carriage in advance, he cannot be required to pay it over again to another party, who has, without his authority, performed the service. In such case, there is no privity of contract between him and the carrier who performs the service, and the latter has no lien upon the property against the owner, but must look to the party who employed him, for his compensation.

But a carrier, employed to forward goods, may employ another carrier to perform the service, and the latter will have a lien on the goods for his charges, where the charges for carriage have not been previously paid to the former carrier. *Nordmeyer v. Loescher*, 499

14. An agreement to carry a passenger and his baggage includes only ordinary

baggage, or such articles of necessity and personal convenience as are usually carried by passengers.

15. H. agreed to convey N. from Hamburg to New York, and to forward her baggage to her there, to the care of the defendant. He employed another carrier to forward the baggage, from whom it was received by the defendant. It did not appear whether N. had paid for her passage, or the carriage of her baggage, or not:—*Held*, that, in the absence of such evidence, the defendant had a lien on the baggage for charges incurred in the carriage thereof, and paid by him to the carrier.

16. It seems, that where a horse dies through the neglect of a common carrier, to whom he has been delivered for transportation, the damages for such neglect consist of the value of the horse at the place of delivery, at the time he should have been delivered. *Davis v. The N. Y. & Erie R. R. Co.* 543

See BAGGAGE.  
COMMISSIONERS OF EMIGRATION.

COMMON COUNCIL.

See NEW YORK CITY.

COMPLAINT.

See PLEADING.

COMPROMISE.

1. The acceptance by a creditor, from his debtor, of a sum less than the entire debt in full payment and discharge, and the giving of a receipt therefor, expressed to be in full, does not operate to discharge the debtor. He can be discharged only by a release under seal.

But a mutual agreement by various creditors with each other to receive from a debtor a sum less than their respective claims, or such an agreement by a single creditor with his debtor, upon the faith of which other creditors are induced to make a similar compromise, is binding. The benefit which each creditor gains by the engagement of the others to forbear, and the consequent securing of a fund for the

mutual benefit of all, is a sufficient consideration to sustain such an agreement.

*It seems* that where the debts lie in simple contract the composition agreement may be by parol. *Williams v. Cartington*,

515

is issued may bring an action against the constable for his neglect, and in which a recovery may be had to the extent of the damages proven to have been sustained by reason of the default of the officer.

*Ibid.*

2. C., having made an agreement with a number of his creditors to compromise at the rate of forty cents on the dollar, made a similar agreement with one W., to whom he paid forty per cent. of his indebtedness to him, receiving from him a receipt in full. He also gave him a sealed agreement to give his note for forty per cent. additional as soon as his compromise should be completed with all his creditors, on condition that W. would sign a paper purporting to compromise his claim for forty per cent. The latter engagement was never performed. *Held*, there being no evidence that the other creditors of C. were induced to compromise by the action entitled to recover the balance of his debt of W., that W. was from C. *Ibid.*

See FRAUD.  
PARTNERSHIP.

## CONFESSON OF JUDGMENT.

See JUDGMENT, 3.

## CONSIDERATION.

See COMPROMISE.  
CONTRACT.  
STATUTE OF FRAUDS.

## CONSTABLE.

1. The provisions of 2 Revised Statutes, 253, sec. 159—giving the party, in whose favor an execution is issued, an action of debt against the constable receiving it, who fails to return it within five days after the return day, and in which action it is provided that the recovery shall be the amount of the execution with interest—do not apply to process issued out of the Marine or justices' courts of the city of New York. *Brown v. Jones*, 204

3. The surety of a constable upon his official bond is liable in damages for the constable's neglect to return an execution within the time required by statute.

The condition of such bond, that the constable "shall in all things well and faithfully perform and execute the duties of the office of constable, without fraud, deceit, or oppression," requires two things:—*First*, That he shall perform the duties of his office;—*Second*, That he shall do so without fraud, deceit, or oppression. The former is for the benefit of the creditor, the latter for the protection of the debtor. And in an action by the former upon the bond for the official neglect of the constable, e. g., to return an execution within the requisite time, it is not necessary to show fraud, deceit, or oppression.

In such an action, a judgment previously recovered against the constable for the same neglect is *prima facie* evidence of the amount for which the surety is liable. *Carpenter v. Doody*, 465

4. In an action against a constable for a neglect to return an execution, the plaintiff's damages are *prima facie* the amount of the execution; but the constable may show that the plaintiff has sustained no damage, or less than the full amount of the execution, and limit the recovery against himself accordingly. *Ibid.*

5. The provisions of the Revised Statutes (2 R. S. p. 449, § 142, 4th ed.), rendering a constable liable in all cases in the amount of the execution, for a neglect to return the process within the required time, do not apply to constables in the city of New York. *Ibid.*

See APPEAL, 29.

## CONSTITUTIONAL LAW.

See NEW YORK CITY.

## CONTRACT.

1. In an action brought by an employee

to recover the contract price agreed to be given him, upon an averment of readiness and tender of performance on his part, and refusal to accept performance on the part of his employer, it is no defence that a former action has been brought by him to recover both damages for the defendant's breach of the contract in discharging him and a balance of salary up to the time of his discharge, where the claim for damages was withdrawn upon the trial, and judgment rendered only for the balance due for services actually rendered prior to the discharge. *Thompson v. Wood*, 93

2. And a tender of performance having been made prior to such action, it is not necessary to repeat the tender in order to maintain a new action on the contract.

*Ibid.*

3. In such an action, the employee, having been discharged without just cause, is entitled *prima facie* to recover the full amount of the contract price up to the time of the commencement of the action. It devolves upon the defendant to show, in mitigation of damages, that the plaintiff might have obtained employment elsewhere.

*Ibid.*

4. Where work is done under a contract, the specifications of which are departed from by direction of the defendants, such a departure excuses performance within the time limited by the contract, and the obligation thereafter is to complete the work within a reasonable time. *Green v. Haines*, 254

5. What is a reasonable time is a question of fact for the determination of the jury, or referee, upon all the evidence in the case.

*Ibid.*

6. In such an action, what facts amount to an acceptance by the defendants of the plaintiff's work—considered.

*Ibid.*

7. It is not sufficient, to avoid a contract, that the party bound by it is illiterate, and that it was not read over to him, if it was explained to him in substance, and there was no omission, concealment, or misrepresentation of any of its obligations. *Ellis v. McCormick*, 313

8. It is the duty of the court to determine as to the validity and effect of a contract, whether written or parol, the terms of which are not disputed; but

where the evidence in respect to its terms is conflicting or doubtful, and a question arises as to the intent of the parties to it, it must be submitted to the jury for their determination, under proper instructions from the court upon the law governing the case. *Chapin v. Potter*, 366

9. Where the purchaser of goods, under a written agreement, promised that, if the seller would defer delivery, he (the purchaser) would be responsible for any expense or damage which the seller might sustain by reason of the delay—held, that this was a valid agreement, under which the seller might recover expenses of storage, &c., incurred during the delay. *Orquerre v. Luling*, 383

10. B. contracted to do certain building work for I., according to certain specifications. By the terms of the contract, the work was to be done in a good, workmanlike and substantial manner, to the satisfaction, and under the direction of S., an architect, to be testified by a certificate of S., upon the presentation of which the payments were to be made in certain installments as the work progressed. B. presented to I. certificates in these words:

Date.

"F. I., Esq.—This is to certify, that the —— payment, amounting to —— dollars, is now due to M. B., on account of his contract with you for doing the masons' and carpenters' work of your store, No. 46 Warren street."

*Held*—I. That the certificates were sufficient. It was to be presumed therefrom, that there had been a substantial compliance with the contract, and that S. was satisfied therewith.

II. That I having made payments on similar certificates, without objection to their form, at the time of presentation, he could not raise the objection for the first time on the trial. *Bloodgood v. Ingoldsby*, 388

11. Where there are deficiencies in work done under a contract, although the defendant accept the work, he may claim damages for the deficiencies by way of recoupment. *Ibid.*

12. By the act of the legislature incorporating the N. Y. & H. R. R. Co., passed April, 1831 (Laws 1831, p. 323), it was provided that nothing contained in it

should authorize the construction of their railway across or along any of the streets of the city of New York without the consent of the mayor, &c., who were thereby authorized to grant permission to so construct it, or to prohibit its construction; and, if constructed, to regulate the time and manner of using the same, and the speed with which carriages might move on it. In December, 1831, on the application of the company, an ordinance was adopted by the mayor, &c., permitting the track to be laid in certain streets providing, however, that if, after its construction, it should, in the opinion of the mayor, &c., constitute an obstruction or impediment to the future regulation of the city, or the ordinary uses of any street or avenue, the company should forthwith provide a satisfactory remedy therefor, or remove the rails; and, also, expressly reserving and retaining to the mayor, &c., the right to regulate the description of propelling power to be used on the track, and the speed of the same, as well as all other power reserved in the act of incorporation. The ordinance was to have no binding force, or go into effect, until the railroad company, in writing and under seal, covenanted to abide by and perform its conditions. An agreement of this nature was executed and filed in the office of the city comptroller, and thereupon the company laid their track on the Fourth avenue and other streets. In December, 1834, the mayor, &c., of New York prohibited the running of steam engines, or locomotives, on the track of the company on Fourth avenue south of Forty-second street, after eighteen months from that time.

*Held*.—I. That the ordinance was valid, and was not a violation of any of the franchises granted to the railroad company.

II. That granting permission to lay the track did not deprive the mayor, &c., from subsequently regulating its use by the company.

III. That the agreement of the company was valid as a *restriction* upon its corporate power, and was in no sense a *transfer* of it.

IV. That the corporation can make no valid contract which will interfere with its legislative control over the streets; and any such contract, if made, is revocable at its pleasure. *N. Y. & Harlem R. R. Co. v. The Mayor, &c., of N. Y.* 562

13. A party, applying to a court for the application of its equitable powers, should

be held to the rule, "that he who seeks equity must do equity." He will not be allowed to found his claim upon a permission in a contract, while he repudiates the conditions upon which the permission was granted. *Ibid.*

14. A corporation, like an individual, may be bound by an implied contract, provided the subject matter of it is within the scope of its corporate authority. *Ibid.*

See **ACTION**, 11.

**COMPROMISE**, 1, 2.

**DEED**, 1.

**EVIDENCE**, 20.

**HUSBAND AND WIFE**, 2.

**LANDLORD AND TENANT**, 12, 13.

**NEGLIGENCE**, 6, 7.

**PRINCIPAL AND AGENT**, 2.

**RESCISSON**, 1.

**SALE AND DELIVERY OF CHAT-  
TELS**, 5, 6, 7.

#### CONVERSION.

See **CHATTELS**, 1, 2, 3, 4.

#### CORPORATION OF NEW YORK.

See **NEW YORK CITY**.

#### CORPORATION ORDINANCES.

See **NEW YORK CITY**.

#### CORPORATIONS.

1. Authority to accept on behalf of a company cannot be proved by parol. It can be conferred only by a resolution of the board of directors, and the resolution must itself be produced. *DALY, J.*, dissenting. *Bruce v. Lord*, 247

2. An action may be commenced in a district or justice's court against a resident corporation by a short summons, when the plaintiff is a non-resident and furnishes the requisite bond and affidavit. *Wilde v. N. Y. & Harlem R. R. Co.*, 302

3. The president and two of the trustees of a corporation signed an agreement submitting a controversy, in which the corporation was interested, to arbitration; and all the trustees attended before the

arbitrators, and took part in the trial of the controversy as witnesses, &c. *Held*, a sufficient submission to bind the corporation by the award.

The assent of a corporation to a submission may be inferred from circumstances. *Isaacs v. The Beth Hamedash Society*, 469

4. Where the submission of a controversy to arbitration provided that the decision of "a majority" of the arbitrators should be binding, and the bond provided that the award should be subscribed "by the said arbitrators"—*held*, that the submission and bond must be taken together, and that an award signed by two of the three arbitrators was valid. *Ibid.*

5. A corporation, like an individual, may be bound by an implied contract, provided the subject matter of it is within the scope of its corporate authority. *N. Y. & Harlem R. R. Co. v. The Mayor, &c., of New York*, 562

6. Courts are bound to assume, where a discretion is vested in a municipal body, exercising functions of a legislative character, that good reasons existed for doing an act which was the result of such a discretion. *Ibid.*

7. This court has jurisdiction of all actions against the corporation of the city of New York, upon any cause of action whatever, whether it be of a legal or equitable nature. *So held* in an action to restrain the enforcement of an ordinance of the corporation, upon the ground that it was passed in violation of an agreement entered into by the corporation with parties affected by the ordinance; and also that it was illegal and unauthorized by law. *Ibid.*

See BANKS.

EVIDENCE, 21.

JURISDICTION, 1, 2.

JUSTICES' COURT PRACTICE 24.

NEW YORK CITY.

PLEADINGS, 2.

PRACTICE, 2.

PROMISSORY NOTES, 2, 3, 4, 5.

SUPPLEMENTARY PROCEEDINGS, 2, 3, 4.

COSTS.

1. Where judgment is rendered for the

plaintiff, for an amount fixed by stipulation between the parties, the plaintiff is entitled to costs in addition thereto, although they are not mentioned in the stipulation. *Wing v. N. Y. & E. R. R. Co.*, 235

2. An action having been brought upon an agreement to recover a balance claimed to be due thereon, and to enforce a lien therefor, and a verdict having been rendered for the plaintiff for \$1—

*Held*, that the action was one for the recovery of money only, and the defendant was entitled to costs. *Trust v. Pirs-son*, 292

3. Costs, as taxed or adjusted by the clerk, are not, under the Code, the measure of compensation for the services of the attorney, in an action between himself and his client to recover therefor.

In such an action, proof of the value of the service is required. *Garr v. Maires*, 498

See EXTRA ALLOWANCE.  
PRACTICE, 10.

COUNTER-CLAIM.

1. In an action to recover damages for a tort, the defendant cannot set up, as a counter-claim or recoupment of damages, an independent tort committed by the defendant, and not connected with the transaction upon which the plaintiff's right of action is founded. *Murden v. Priment*, 75

2. The cases specified in which, prior to the Code, the defendant was allowed to recoup his damages. *Per Daly, J.*, *Ibid.*

3. *It seems*, that all which formerly was allowed to be set up as a defence, by way of recoupment, is now available as a counter-claim under the Code. *Ibid.*

4. N. sold boots and shoes to the wife and children of the defendant, for which this action was brought by N.'s assignee. The answer set up a counter-claim for a cemetery lot sold to N. by the defendant's wife. The evidence showed that the defendant's wife had sold to N. a certificate which entitled him to a deed of a lot in the C. H. Cemetery, that he obtained upon the certificate such a deed from the company owning the cemetery, and took

possession under it. There was also some evidence of an agreement between him and the defendant's wife, that he should pay for the lot, one half in boots and shoes.

*Held*.—I. That this did not constitute a good counter-claim in the action against the defendant by the plaintiff's assignor. It was neither in favor of the defendant nor against the plaintiff.

II. That though it was not admissible to establish a counter-claim, it was admissible for the purpose of showing that the goods were delivered to the defendant's wife, in payment of moneys owing to her by N., and that no liability was ever incurred on the part of the defendant to pay for them.

III. That, under the loose system of oral pleadings allowed in justices' courts, this evidence was admissible in such a court, under an answer which set up the facts as a counter-claim.

IV. That it was immaterial whether the defendant's wife gave to N. a strictly legal transfer for the lot, provided he obtained, upon the certificate given to him, possession of the property and a sufficient deed thereof. *Chaffee v. Cox*, 78

5. A claim for the wrongful conversion of a chattel, which is a cause of action arising out of a tort, cannot be set up by way of counter-claim, in an action arising upon contract. *Piser v. Stearns*, 86

6. A trespass by a landlord, not made under an assumption of title, is no breach of a contract of letting—is not a cause of action arising out of a contract for the payment of rent—is not connected with the subject of an action brought to recover rent of demised premises, and therefore cannot be set up in such an action as a counter-claim. *Edgerton v. Page*, 320

7. Where the defence to the plaintiff's claim consists of a counter-claim in favor of the defendant, and the plaintiff's claim is proved, the defendant must substantiate his counter-claim to the entire satisfaction of the justice, before the plaintiff can be charged with any part thereof. Where the counter-claim is for damages, and the justice cannot decide whether the injury should be borne by the plaintiff or the defendant, he has no right to divide the loss between the parties, but, unless affirmatively satisfied of the justice of the counter-claim, must disregard it, and render judgment for the plaintiff's claim. *Prentice v. Sprague*, 428

8. In an action by the assignee of B. & F. against G., the latter interposed, as a set-off or counter-claim, a claim held by him against the assignors B. & F. Upon the trial, it appeared that he had recovered judgment therefor prior to this action.

*Held*, that the justice erred in admitting evidence of the original claim on which such judgment had been recovered. The claim was merged in the judgment, and could not be used as evidence of indebtedness. *Ires v. Goddard*, 434

9. In the action by G. against B. & F., brought after their assignment to the present plaintiff, evidence of their claim against G. was offered as a set-off, and excluded upon the ground that it had been assigned.

*Held*, that it was properly excluded; and the fact that it had not been set off in such action was no bar to another action on such claim by the assignee. *Ibid*.

See CONTRACT, 11.  
EVICTION, 4, 5.  
JUSTICES' COURT PRACTICE, 6.  
PRACTICE, 6, 8.  
SALE AND DELIVERY OF CHAT-  
TELS, 5.  
SET-OFF, 1.

#### COVENANT.

1. A recital in a lease of the purposes for which demised premises are let, constitutes an express covenant on the part of the tenant to use them for no other purpose. Thus, the lease reciting that the landlord let the premises to the tenant "to be occupied as a lumber-yard"—*held*, that this constituted an express covenant, on the part of the tenant, to occupy them for that purpose, and that the erection of buildings thereon, by the tenant's assignee, was a wrongful act. *De Forest v. Byrne*, 43

See ACTION, 1.  
LEASE, 3.  
NEW YORK CITY, 6, 7.  
USE AND OCCUPATION, 3.

#### CREDITOR.

1. When a debtor assigns property for the benefit of his creditors, they are all interested in the estate thus appropriated; and no diversion can be made of the trusts thus created, nor any delegation of any

power conferred, without their assent, or the sanction of some tribunal possessing the power to allow such diversion or transfer. *Small v. Ludlow*, 189

2. The acceptance by a creditor, from his debtor, of a sum less than the entire debt in full payment and discharge, and the giving of a receipt therefor, expressed to be in full, does not operate to discharge the debtor. He can be discharged only by a release under seal. *Williams v. Carrington*, 515

3. But a mutual agreement by various creditors with each other to receive from a debtor a sum less than their respective claims, or such an agreement by a single creditor with his debtor, upon the faith of which other creditors are induced to make a similar compromise, is binding. The benefit which each creditor gains by the engagement of the others to forbear, and the consequent securing of a fund for the mutual benefit of all, is a sufficient consideration to sustain such an agreement. *Ibid.*

4. It seems that where the debts lie in simple contract the composition agreement may be by parol. *Ibid.*

5. C., having made an agreement with a number of his creditors to compromise at the rate of forty cents on the dollar, made a similar agreement with one W., to whom he paid forty per cent. of his indebtedness to him, receiving from him a receipt in full. He also gave him a sealed agreement to give his note for forty per cent. additional as soon as his compromise should be completed with all his creditors, on condition that W. would sign a paper purporting to compromise his claims for forty per cent. The latter engagement was never performed.

*Held*, there being no evidence that the other creditors of C. were induced to compromise by the action of W., that W. was entitled to recover the balance of his debt from C. *Ibid.*

6. In order to sustain an action, brought by a creditor to set aside, as fraudulent and void, a conveyance of real estate made by his debtor, the plaintiff must show a judgment recovered in his favor against the debtor. Unless he stands in the relation of judgment-creditor he cannot attack such conveyance.

In such an action the grantees of the

debtor's estate may impeach the judgment, either by showing it to be fraudulent upon its face, or by evidence *aliunde*. Only the parties to a judgment are concluded by it. *Neusbaum v. Keim*, 520

See ARREST, 1.

ASSIGNMENT, 1, 2, 4, 6, 7, 9, 10.

HUSBAND AND WIFE, 1, 2, 3.

LEASE, 6.

MARRIED WOMAN, 1, 2.

SUPPLEMENTARY PROCEEDINGS, 5, 6.

#### CUSTODIA LEGIS.

See ACTION, 14.

#### D

#### DAMAGES.

1. For a trespass committed under an honest mistake, without intent to injure, the amount of damages recoverable should be confined strictly to the injuries sustained. *Shannon v. Burr*, 39

2. When property, unlawfully taken, is afterwards returned to the owner, before suit brought, and is accepted by him, the return and acceptance should be considered in mitigation of damages. In such a case, judgment for the whole value of the property taken is erroneous. *Hibbard v. Stewart*, 207

3. In an action by lessee against lessor, to recover damages for failure to give possession, the rule of damages is the difference between the yearly value of the premises and the rent reserved.

It is erroneous, in such action, to receive evidence of the amount plaintiff has been compelled to pay to obtain premises, instead of those leased him by defendant. *Dean v. Roessler*, 420

4. In an action tried before a referee, evidence on the question of damages, which, under the proper rule, was incompetent, was offered and objected to, but was taken down by the referee, subject to the objection; and he afterwards considered it in awarding damages. Exceptions were filed to his decision, one of which was, that the decision was "con-

trary to the law and the evidence;" but no exception was taken specifically to the rule of damages adopted. *Held*, on appeal, that the court would review the decision of the referee in respect to the measure of damages adopted by him. *Ibid.*

5. In an action against a constable for a neglect to return an execution, the plaintiff's damages are *prima facie* the amount of the execution; but the constable may show that the plaintiff has sustained no damage, or less than the full amount of the execution, and limit the recovery against himself accordingly. *Carpenter v. Doody*, 465

6. It seems, that where a horse dies through the neglect of a common carrier, to whom he has been delivered for transportation, the damages for such neglect consist of the value of the horse at the place of delivery, at the time he should have been delivered. *Davis v. The N. Y. & Erie R. R. Co.*, 543

See ACTION, 3, 11.

APPEAL, 14, 15, 16.

COMMON CARRIER, 4, 5.

CONSTABLE, 2, 3.

CONTRACT, 3.

COUNTER-CLAIM, 7.

LANDLORD AND TENANT, 2, 3.

NEGLIGENCE, 4, 5, 6, 7.

NUISANCE, 3, 4.

RESCISSON, 1.

SALE AND DELIVERY OF CHAT-  
TELS, 5.

WARRANTY, 4.

DEATH—WHEN PRESUMED.

See EVIDENCE, 24, 25, 26, 27.

DEBTOR AND CREDITOR.

See CREDITOR.

DEFAULT.

1. This court cannot relieve a defendant, under § 366 of the Code, from a judgment taken by default in a district court, if he has once appeared in the action. *Wilde v. N. Y. & Harlem R. R. Co.*, 302

302

See APPEAL, 1, 2, 29 to 33, 42.  
MARINE COURT, 1.

DEED.

1. A party who contracts to convey land is required to deliver a deed of conveyance of the property in such a condition as to make it *at once* operative to the purchaser against all persons. *Smith v. Smeltzer*, 287

DEMURRER.

See PRACTICE, 7.  
APPEAL, 35.

DISTRICT COURT.

See APPEAL.  
JUSTICES' COURT PRACTICE.  
MARINE COURT.

E

ENDORSER.

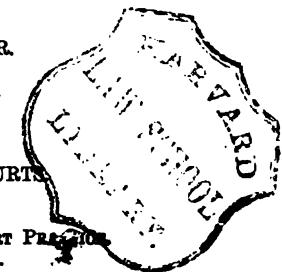
See PROMISSORY NOTES, 1, 5, 8, 9, 10.  
PROTEST, 1.  
USURY, 1.

EQUITABLE RELIEF.

1. A party, applying to a court for the application of its equitable powers, should be held to the rule, "that he who seeks equity must do equity." He will not be allowed to found his claim upon a permission in a contract, while he repudiates the conditions upon which the permission was granted. *N. Y. & Harlem R. R. Co. v. The Mayor, &c., of N. Y.*, 562

ESTOPPEL.

1. Where a person stands by, and knowingly suffers another to claim to be the owner of personal property, and to make an agreement concerning it with a third person, he cannot afterwards assert his own title to such property, to the damage of the party deceived. *Hibbard v. Stewart*, 207



SEE MARRIED WOMAN, 1, 2.  
USE AND OCCUPATION, 3.

## EVICTION.

1. An interference by the landlord with the person of the tenant, although on the demised premises, does not constitute an eviction. It is a trespass only, and the remedy of the tenant is by action for the assault. *Vale v. Herner*, 149

2. The use of a privy by a landlord in a passage way leading to the demised premises, and which was there at the time of the hiring, although so used as to be offensive to the tenant, does not of itself constitute an eviction, the tenant not being actually deprived of any part of his premises. *Ibid.*

3. A refusal, by a landlord occupying premises in conjunction with his tenant, to permit an under-tenant of the tenant to occupy the premises demised, is an eviction by the landlord, and will prevent his recovery in an action against the tenant for the rent.

But the mere entry by the landlord upon his tenant's premises, unaccompanied by any attempt to exclude the tenant therefrom, does not constitute an eviction. *Randall v. Albertis*, 285

4. E. leased certain premises to P. for one year, with the privilege of a year's renewal at the same rent. In an action for the last quarter's rent of the first year, P. alleged, as a defence, that the plaintiff had maliciously and wantonly allowed large quantities of waste water to come down into the demised premises, greatly injuring his goods, and compelling him to leave the premises at the end of the first year, thereby losing the privilege of renewal. The defendant having remained in possession of the premises during the entire year—held, on demurrer to answer, that these facts constituted no defence.

I. They did not amount to an eviction. Every obstruction by the landlord to the beneficial enjoyment of the premises demised does not constitute an eviction. To constitute an eviction, the lessee must have been compelled to abandon the whole or some part of the premises by the wrongful act of the lessor.

II. Nor did they constitute a ground for a counter-claim or recoupment. Every act of the landlord, disturbing the tenant's

beneficial enjoyment of the demised premises, does not constitute the basis of a counter-claim or recoupment in an action for rent, but only such acts as amount to an eviction, total or partial, or an unlawful injury to the premises in violation of the contract of letting.

III. They show merely a disturbance of the beneficial enjoyment of the tenant, but no interference with his possession. *Edgerton v. Page*, 320

5. *Per Brady, J., dissenting*:—A tenant has a right to abandon the demised premises at any time during the landlord's continuance of the disturbance of his beneficial enjoyment of the premises. If the disturbance cease before the rent becomes due, and while the tenant is still in occupation, the rent may be recovered. If the disturbance continue during the whole period of that part of a term during which rent accrues, and down to the time when the rent becomes due by the agreement, and the tenant then abandons the premises in consequence of such disturbance, the rent cannot be recovered. *Ibid.*

## EVIDENCE.

1. The delivery and acceptance of the key of leased premises is sufficient to establish the fact of occupation, which will be presumed to continue until an interruption thereof is shown. *Seaman v. Ward*, 52

2. The defendant's admission, that he had had certain goods, is sufficient evidence of delivery to maintain an action for the sale and delivery of the goods, although it appears that they were in fact delivered to some other person. *Griffin v. Keith*, 58

3. In an action for goods sold and delivered, the evidence showed that the defendant admitted the correctness of the bill and promised to pay it, but objected to the interest, and said he bought the goods on credit, without specifying the length of credit—held, there being evidence that he had made payments on account before suit brought, that the judgment, in favor of the plaintiff for the amount and interest, was correct. *Whitlock v. Bueno*, 72

4. Parol proof of the commencement and trial of a former suit is admissible;

but it *seems* not evidence of matters that would appear in the pleadings. *Chaffee v. Cox*, 78 the presumption arising from the proof of such arrest of D. at the instigation of the plaintiff. *Brennan v. Haff*, 151

5. A witness, in testifying to a conversation, will not be required to give the precise words used. He may be allowed to state the substance merely. *Ibid.* 12. In an action to recover for money lent to the defendant while an infant, his admissions of the amount received by him, though made during his infancy, are admissible as evidence of the sum loaned. *Ackerman v. Runyon*, 169

6. A notice to the plaintiff, to produce a letter written by the defendant to the plaintiff's assignor, does not entitle the defendant to offer secondary evidence of its contents, upon the plaintiff's failure to comply with the requisition in the notice. He should subpoena the assignor to produce it. If it has been lost or destroyed, parol evidence of its contents may be given. *Ibid.* 13. The promise of the defendant, after attaining his majority, to pay the plaintiff what he owed him, is a sufficient promise to charge him with the indebtedness, although nothing was said at the time about the amount due. *Ibid.*

7. Whether the written rules of a company may be proved by parol? *Quare v. Ibid.* 14. What promise, made after majority, to pay a debt previously contracted, is sufficient to charge a defendant—considered. *Ibid.*

8. When a defendant seeks to justify the taking of personal property under an execution against a person other than the plaintiff, it is not sufficient to produce the execution; the judgment on which it was issued must also be proved. *Gelhaar v. Ross*, 117 15. The execution of an instrument, not under seal, may be proved by the admission of the party, although the instrument is attested by a subscribing witness who is not called, or his absence excused. *Giberton v. Ginochio*, 218

9. It *seems*, that a certified copy of a chattel mortgage is admissible in evidence with like effect as the original, where the original is upon file. *Van Hassell v. Borden*, 128 16. Mere impressions of a witness, unaccompanied by any circumstance, are of no avail in opposition to positive testimony. *Dresser v. Vanpelt*, 318

10. It is erroneous to permit a witness to testify to an account from a transcript of the party's books, without their production, and especially so when his adversary has given him notice to produce the books on the trial. *McCormick v. Mulvihill*, 131 17. Under a plea of the statute of limitations, the assignor of plaintiff swore positively that a part payment had been made, but stated that he could not say positively it was made within six years, although he believed it was. The defendant swore positively that he had made no payment within six years. *Held*, that a finding of the justice in favor of the plaintiff was clearly against evidence; that this was not a case of conflict of testimony, but of imperfect recollection on one side, and positive recollection on the other. *Ibid.*

11. The defendant's horse having been stolen, he offered a reward of fifty dollars for the detection of the thief. The plaintiff informed him that D. was the thief, and gave him some information tending to sustain this charge, and the defendant had D. arrested therefor. *Held*, sufficient *prima facie* evidence to sustain a recovery for the amount of the reward, without showing D.'s conviction on the charge. If D. had been acquitted, or released, or if the charge made against him was unfounded, it was incumbent on the defendant to show the fact, to rebut the presumption arising from the proof of such arrest of D. at the instigation of the plaintiff. *Brennan v. Haff*, 151

18. The production of a check, drawn payable to "bearer," upon the trial, is sufficient *prima facie* evidence of title to enable the plaintiff to recover upon it. *Townsend v. Billinge*, 353

19. The recollection of a fact by a witness is one thing, and his being convinced of a fact of which he has no recollection,

another; and the former is the only testimony which it is competent for a witness to give—the other is not testimony. *Taylor v. Stringer,* 377 25. What is a sufficient length of time to create such a presumption considered, and the cases upon the question collated and examined. *Ibid.*

20. Under a written contract of sale, which is silent as to time of delivery, it is competent to prove a subsequent oral agreement, distinct from the original contract, fixing the time of delivery. Such proof does not conflict with the rule which excludes parol evidence, enlarging or varying a written contract. *Or-  
guerre v. Luling,* 383 26. T. having departed upon a voyage, the ordinary limit of which was four months, and seventeen months having expired, and nothing having been heard of the vessel in which he sailed, or of those who were in her, and the period of time being much more than sufficient to have heard from all the commercial ports of the world—held, that it must be presumed that the vessel was lost, and that those on board of her, including T., had perished; and therefore his bail were entitled to be discharged. *Ibid.*

21. The books of a corporation may be proved by any person who was present when they were made, and who knows of his own knowledge that they are correct records of the transactions which they profess to record. The secretary need not be called to verify them himself. *St. Lawrence M. Ins. Co. v. Paige,* 430 27. The presumption of death in such a case does not rest upon the fact that the party has been absent and unheard of for such length of time alone, but upon the weightier circumstance that the vessel has not been heard from. The question is not, whether it is not possible that the party may be alive, but whether these circumstances do not present so strong a probability of his death that a court of justice should act thereon. Presumptions founded in a reasonable probability must prevail against mere possibilities. Otherwise the conclusion could never be arrived at, that a man was dead until the natural limit of human life had been reached. *Ibid.*

22. In an action for rent upon a written contract to hire, signed by the tenant only, it is to be presumed, in the absence of evidence to the contrary, that the landlord's agreement to let was also in writing. In such an action, evidence of a parol agreement, on the part of the landlord, to repair, is inadmissible, except it is preceded by proof that the landlord's agreement to let rested in parol. *Mayer v. Maller,* 491 28. Courts are bound to assume, where a discretion is vested in a municipal body, exercising functions of a legislative character, that good reasons existed for doing an act which was the result of such a discretion. *N. Y. & Harlem R. R. Co. v. The Mayor, &c., of N. Y.,* 562

23. Parol evidence is inadmissible to show that a due bill, purporting to be payable immediately, was intended to be payable at a different time. *Van Allen v. Allen,* 524 29. No acknowledgment or promise is sufficient evidence of a new or continuing contract, to take a case out of the operation of the statute of limitations, unless contained in some writing signed by the party to be charged thereby. The effect of the enactment of the provision in the Code of 1849, requiring such promise to be in writing, is to establish a new rule of evidence for all cases, where the action is brought after the period limited by statute. *Hope v. Buzerl,* 544

24. There is no arbitrary or positive rule in respect to the time when the presumption of death may be drawn from the continued absence of a person. It is not necessary that seven years, or any specific period, should elapse, to lay the foundation for such presumption, but it may be drawn whenever the facts of the case will warrant it. If the party, whose death is in question, went to sea, and nothing has been heard of the vessel in which he left, or of those who went in her, the presumption, after a sufficient length of time has expired, will be that the vessel was lost, and that all on board of her perished. *Merrill v. Thompson,* 550 See ACTION, 3.  
ADMISSIONS, 1, 3, 4.

See **APPEAL**, 23, 26, 27.  
**ARBITRATION**, 1, 2, 3.  
**BAGGAGE**, 1.  
**BROKERAGE**, 1, 4, 5.  
**CONSTABLE**, 3, 4.  
**CONTRACT**, 8.  
**COSTS**, 3.  
**COUNTER-CLAIM**, 4.  
**FREIGHT**, 2.  
**INNKEEPER**, 2.  
**JUDGMENT**, 2.  
**LANDLORD AND TENANT**, 8.  
**LEASE**, 1, 7.  
**NUISANCE**, 2, 3, 4.  
**PARENT AND CHILD**, 1, 2, 4.  
**PARTNERSHIP**, 2.  
**PROMISSORY NOTES**, 6, 7, 17.  
**PROTEST**, 1.  
**RESCISSION**, 1.  
**SALE AND DELIVERY OF CHAT-  
TELS**, 1, 6, 7.  
**SEAMAN'S WAGES**, 10 to 14.  
**STATUTE OF FRAUDS**, 1, 3.  
**SURRENDER**, 2.  
**TENDER**, 3.  
**USE AND OCCUPATION**, 3, 4.  
**WARRANTY**, 4.

#### EXCEPTIONS.

1. Objection to questions as leading should specify the ground of the objection, so that the form of the question may be altered accordingly—otherwise the objection will not be considered upon appeal.  
*Tattersall v. Hass*, 56

2. Exceptions to the decision of the court or a referee, upon a trial before either, must be taken within ten days after notice of the entry of judgment, and the case or bill of exceptions made will not usually be resettled so as to allow exceptions to be inserted which were not taken within that time, and especially not if an argument upon the case or bill of exceptions has been had, and a decision rendered thereon.  
*Beach v. Raymond*, 201

3. After the decision of an appeal, by the court in *banc*, the unsuccessful party cannot be allowed, for the purpose of an appeal to the Court of Appeals, to insert exceptions not appearing in the case, upon which the appeal in this court has been argued and decided.  
*Ibid.*

4. In an action tried before a referee, evidence on the question of damages,

which, under the proper rule, was incompetent, was offered and objected to, but was taken down by the referee, subject to the objection; and he afterwards considered it in awarding damages. Exceptions were filed to his decision, one of which was, that the decision was "contrary to law and evidence;" but no exception was taken specifically to the rule of damages adopted.

*Held*, on appeal, that the court would review the decision of the referee in respect to the measure of damages adopted by him. *Dean v. Roesler*, 420

See **APPEAL**, 28.  
**CONTRACT**, 10.

#### EXECUTION.

1. The interest of a mortgagor in chattels, before default, may be levied on and sold under execution. But where, after default in the mortgage, it is ~~not~~ foreclosed, and the property passes into the possession of the mortgagee, the officer becomes a trespasser, if he sells the property and delivers possession to a third person, and is liable in damages to the mortgagee therefor. *Gelhaar v. Ross*, 117

2. Executions were issued in May, 1848, on judgments then recovered in this court. The executions, by mistake, purported to be issued on judgments in the Supreme Court. This error was not discovered until after a sale under the executions, and an acknowledgment thereon of payment. Subsequently, and in 1851, an order was made, on application of the plaintiffs, granting leave to issue new executions, but none were issued until 1856.

*Held*, that such executions were irregular, and must be set aside. The application, for leave to issue execution for the purpose of removing the bar of section 284 of the Code, cannot be made until after five years from the date of the judgment. After five years the law presumes that the judgment has been paid; and such presumption is not removed by an order made prior to that time. *Field v. Paudling*, 187

3. The court should not grant leave under section 284 of the Code to issue execution on a judgment after the lapse of five years from its rendition, where it appears that the judgment-debtor holds a

judgment, against the party making the application, greater in amount than that on which the application is based. (BRAUDY, J., dissenting.)

In such a case, the party applying for leave should be left to an action upon his judgment, in which action the debtor may avail himself of his equitable set-off. *Bells v. Gurn*, 411

See CONSTABLE, 1 to 5.

INSURANCE, 1.

SALE AND DELIVERY OF CHAT-  
TELS, 4.

EXECUTORS AND ADMINISTRA-  
TORS.

See LEASE 6.

EXPERTS.

See WITNESS, 1.

EXTRA ALLOWANCE.

1. The argument of a demurrer, on which a final judgment is rendered, is a trial, and the successful party may have an extra allowance where the case is difficult or extraordinary.

But this rule does not apply to a decision upon a demurrer noticed as frivolous, and so adjudged. *Small v. Ludlow*, 307

2. The right of a plaintiff to an extra allowance, in a difficult or extraordinary case, is perfect at the time when a verdict is rendered in his favor, although the amount of such allowance may not be determined until afterwards.

In an action for the recovery of money, where the case was difficult, the plaintiff obtained a verdict in his favor at a time when the statute provided that the plaintiff should be entitled to an extra allowance. *Held*, that he was entitled thereto, although the order granting the allowance, and fixing its amount, was not made until after that provision of the statute had been repealed. *Cook v. The Floating Dry Dock Co.*, 556

## F

### FALSE IMPRISONMENT.

1. An action for false imprisonment cannot be maintained for an arrest made upon a warrant, granted by a magistrate having jurisdiction, against the parties upon whose complaint the warrant was issued. *Waldheim v. Sickel*, 45

2. In such an action, it is improper for the justice to allow an amendment of the complaint by adding a count for malicious prosecution; the plaintiff having rested his case and failed to sustain his action in its original form. *Ibid.*

3. In an action for malicious prosecution, the question of the want of probable cause is purely a question of law, unless there is conflicting testimony as to the facts. *Ibid.*

See APPEAL, 14, 15, 16.

### FORWARDER.

1. The difference between common carriers and forwarders considered, and their respective duties and liabilities compared. *Dillon v. N. Y. & Erie R. R. Co.*, 231

See COMMON CARRIER, 1, 5, 6, 14.

### FRANCHISE.

See NEW YORK CITY, 6.

### FRAUD.

1. When the creditors of a debtor have signed a composition deed, every agreement, securing an advantage to one of them withheld from the others, is void. Nor, in such a case, is it necessary to show an execution of the compromise deed by all the creditors. A fraud upon any one of them is sufficient to invalidate the agreement. *Beach v. Ollendorf*, 41

See ARREST, 1.

COMPROMISE, 1, 2.

### FREIGHT.

1. A carrier, who receives grain for

transportation, the freight upon which is to be paid by the bushel, can only recover freight for the quantity actually delivered by him. *Allen v. Bates*, 221

2. The presumption is, that freight belongs, as the earnings of the vessel, to the owners. *Williams v. Insurance Co. of N. America*, 345

See COMMON CARRIER, 2, 5, 8.  
INSURANCE, 1.  
SEAMAN'S WAGES, 2 to 9.

## G

## GAMBLING.

1. No action can be maintained for the recovery of any gambling apparatus or device, seized by a public officer upon a charge that they are kept or used for the purpose of gambling. *Willis v. Warren*, 590

2. A police justice, without warrant, entered the premises of Willis, and, finding several persons engaged in playing cards, arrested them on a charge of gambling, seized the gambling apparatus, and also several lewd pictures found upon the premises. The articles thus taken were placed in the custody of Warren, the property clerk of the Board of Metropolitan Police Commissioners. In an action of claim and delivery, subsequently brought against Warren, to recover their possession—held, that they were in *custodia legis*, and no action would lie for their recovery. The complaint was, therefore, dismissed. *Ibid.*

## GUARANTY.

See PROMISSORY NOTES, 8, 9.

## H

## HIGHWAY.

See NEGLIGENCE, 4, 5.  
NEW YORK CITY, 2 to 9.

## HUSBAND AND WIFE.

1. Where a husband has exclusive control of the separate estate of his wife, and of its accumulations, upon the faith of which it is just to infer he obtained credit, and which he possesses without restriction, exercising acts of ownership, and presenting to the world all the semblance of title, with the permission and by the agreement of his wife, the property is liable to his creditors for his debts. *Sherman v. Elder*, 476

2. The law does not tolerate a contract between husband and wife, by which he becomes her servant, and she receives and retains the advantages and accumulations of his labors. *Ibid.*

3. The acts of 1843 and 1849 confer upon a married woman the right to hold her separate estate free from her husband's debts and power to sell. But they do not relieve her personal estate from the doctrine of the common law when she invests her husband with full power to traffic with it, nor do they give her the right to traffic therewith, and to assume the liabilities and obligations of commercial enterprise. *Ibid.*

See ARREST, 1.

MARRIED WOMAN, 1, 2, 3.

## I

## INDEMNITY

1. In an action upon negotiable paper, which has been lost, the giving of a bond under the statute (2 R. S. 406, § 76), with sufficient sureties, conditioned to indemnify the defendant against all claims by any other persons on account thereof, is an essential pre-requisite to any recovery thereon. *Desmond v. Rice*, 530

## INFANTS.

1. The mere fact that an action, brought to recover for a debt due an infant, is prosecuted by a next friend, instead of a guardian, will not render a judgment against him upon the merits void. Such an error in a district court can only be corrected by an appeal. So long as the

Judgment remains unreversed, it is a bar to any other action for the same cause.  
*Williming v. Schmale*, 263

See EVIDENCE, 12, 13, 14.  
 PARENT AND CHILD, 1, 2, 3, 4.

#### INJUNCTION.

See JURISDICTION, 1, 2.  
 NEW YORK CITY, 2, 3.  
 SUPPLEMENTARY PROCEEDINGS, 5.  
 TRADE MARK, 1.

#### INJURIES TO THE PERSON.

See NEGLIGENCE, 1, 2, 6, 7.

#### INNKEEPER.

1. It is not necessary that a guest at an inn should keep his room locked at all times during his absence, to entitle himself to protection against robbery, and to make the innkeeper liable to him for loss from such a cause. *Buddenburg v. Benner*, 84

2. Where a boarder at a public house took a friend to his room, who stayed there all night, and the evidence showed that they were together the next day, during which time the guest was robbed of his clothes from his room in the hotel—held, that he was not thereby prevented from recovering from the innkeeper the value of the goods so stolen. *Ibid.*

3. A restaurant is not an inn, so as to subject the keeper to the liability of innkeepers.

In order to charge a party as "innkeeper," it should appear that his premises were kept as an inn for the accommodation of travelers. *Carpenter v. Taylor*, 193

4. A person who enters a restaurant for a meal is not to be deemed a guest or traveler, entitled to the protection which the law gives against innkeepers. *Ibid.*

#### INSOLVENTS.

See ASSIGNMENT.  
 SUPPLEMENTARY PROCEEDINGS.

#### INSURANCE.

1. A part-proprietor of a vessel had agreed with one of his co-proprietors for a sale of his interest to the latter; and by the agreement the purchaser agreed to give a bill of sale of his own interest in the vessel as security for the performance of the agreement upon his part. The seller subsequently applied for, and obtained an insurance on the freight, and a loss occurring, brought an action on the policy. It did not appear clearly what had been done under the agreement of sale; whether the purchaser had executed the stipulated bill of sale or not. The interest of the purchaser in the vessel had been sold on execution.

*Held*—I. That, upon the construction of the agreement, it was evidently not the intention of the parties that the interest to be sold should pass, unless the purchaser transferred his interest in the vessel as security.

II. That, there being no evidence that the agreement had been fully performed on both sides, a jury were warranted in inferring that at the time of loss the plaintiff had an interest, either as proprietor of his own original share, or as mortgagee of the interest of the purchaser, which could not be affected by the sale on execution.

III. That it was immaterial (the policy being a valued policy) what was the extent of plaintiff's interest; but either interest above named would enable him to maintain the action. *Williams v. Insurance Co. of N. America*, 315

2. A purchaser of goods, who effects insurance upon them intermediate the sale and the delivery, has no claim upon the seller to be reimbursed for the premium paid, although the goods may have been, in law, at the risk of the seller during the period covered by the insurance. *Orguerre v. Luling*, 383

See JUSTICES' COURT PRACTICE, 24.

#### J

#### JUDGMENT.

1. In an action upon a judgment, by the assignee of the judgment-creditor, it is not necessary to aver any demand of

payment by the assignee, or any refusal to pay by the debtor. *Moss v. Shannon*, 175

inance; and also that it was illegal and unauthorized by law. *N. Y. & Harlem R. R. Co. v. Mayor, &c., of N. Y.*, 562

2. In order to sustain an action, brought by a creditor to set aside, as fraudulent and void, a conveyance of real estate made by his debtor, the plaintiff must show a judgment recovered in his favor against the debtor. Unless he stands in the relation of judgment-creditor, he cannot attack such conveyance.

In such an action the grantees of the debtor's estate may impeach the judgment, either by showing it to be fraudulent upon its face, or by evidence *aliunde*. Only the parties to a judgment are concluded by it. *Neusbaum v. Kettm*, 520

3. When the plaintiff's judgment is entered upon confession, they may object that the statement upon which it is entered is insufficient to sustain the judgment, and if such be the case the plaintiff's complaint will be dismissed.

A statement, that the plaintiff sold to the defendant a quantity of meat in the years 1854 and 1855, and that there was justly due to the plaintiff, upon such sale, a certain specified balance, is insufficient to sustain a judgment thereon.

Such a judgment is void, and cannot be sustained by proof *aliunde* of the facts in detail, out of which the indebtedness arose.

*Ibid.*

See **APPEAL**, 38, 39.

**CONSTABLE**, 3.

**DAMAGES**, 2.

**EVIDENCE**, 8.

**EXECUTION**, 2, 3.

**INFANT**, 1.

**JUSTICES' COURT PRACTICE**, 3, 17.

**MERGER**, 1.

**NONSUIT**, 1, 2.

**PRACTICE**, 9.

**SUPPLEMENTARY PROCEEDINGS**.

#### JURISDICTION.

1. This court has jurisdiction of all actions against the corporation of the city of New York, upon any cause of action whatever, whether it be of a legal or equitable nature. *So held* in an action to restrain the enforcement of an ordinance of the corporation, upon the ground that it was passed in violation of an agreement entered into by the corporation with parties affected by the ordi-

nance; and also that it was illegal and unauthorized by law. *N. Y. & Harlem R. R. Co. v. Mayor, &c., of N. Y.*, 562

2. The Board of Metropolitan Police Commissioners are not state officers, within the meaning of chap. 488 of Laws of 1851, p. 920. They are officers of a locality or district, and, in a proper case, may be restrained by this court, in the exercise of its equity powers, in like manner and to the like extent as other local or county officers. *Ibid.*

#### JUSTICES' COURT PRACTICE.

1. In an action for false imprisonment, it is improper for the justice to allow an amendment of the complaint, by adding a count for malicious prosecution; the plaintiff having rested his case and failed to sustain his action in its original form. *Waldheim v. Sickel*, 45

2. The defendant, by pleading to the merits, waives all defects and irregularities in the summons, although an objection may have been made thereto, prior to joining issue, and reserved to be passed upon at the time of trial.

Pleading to the merits waives all matter in abatement of the action. *Gosling v. Broach*, 49

3. The judgment of the justice must be declared, by some official act, within four days after the trial. It is not enough that it is decided in his own mind. *Seaman v. Ward*, 52

4. The refusal of a justice to allow an amendment of a pleading, if in any case a ground of appeal, can only be so when no injustice would result from granting the application. Where a motion was made upon the trial to amend an answer, so as to add a new defence—*held*, that it was properly refused by the justice. *Tattersall v. Hass*, 56

5. In a justice's court, the absence of the plaintiff upon the day to which the cause has been adjourned is a discontinuance of the action. *Norris v. Bleakley*, 90

6. And where the trial of a cause was commenced, and after the defendant had opened his defence it was adjourned, and the plaintiff failed to attend on the adjourned day—*held*, that the justice erred

in proceeding with the defendant's testimony and awarding judgment in his favor, although a counter-claim had been interposed. *Ibid.*

7. Where the justice disposed of the business before him, and a defendant who was waiting asked for the cause in which he had been summoned, and was informed by the justice that he had no such cause, and he thereupon left the court—held that the plaintiff could not afterwards proceed with the cause in the defendant's absence. *Murling v. Grote,* 116

8. Judgment having been rendered in the plaintiff's favor, upon the default of the defendant, it was opened, and the cause was ordered to be placed on the calendar for 20th February. It was, instead, placed thereon on the 23d, and, the defendant not appearing on that day, an order was made that the judgment before ~~them~~ should stand with costs. Held, irregular,

I. There being no adjournment from the 20th to the 23d, the court lost jurisdiction of the cause.

II. The judgment having been absolutely set aside, could not be revived. The justice should have heard the proofs of the plaintiff, and rendered judgment thereon. *McCullum v. McClave,* 140

9. After the trial of an action in the Marine or justice's court has commenced, the justice has no power to order an adjournment, except upon the consent of both parties, or for the reason that there is not time to conclude the trial at one session. *Giberton v. Ginochio,* 218

10. The practice of entering judgment, *pro forma*, by stipulation, and without prejudice to the rights of the parties, in the Marine or district courts, is improper, and cannot be sanctioned by this court. In all such cases, the judgment will be considered final and conclusive upon questions of fact, unless clearly against the weight of evidence. *Wing v. N. York & Erie R. R. Co.,* 235

11. On the day to which an action was adjourned, the justice was engaged in the trial of another cause. Upon the statement of the plaintiff, that the defendant did not intend to appear, he suspended that trial, and took testimony and rendered judgment in this case. Shortly thereafter, and before the time usually

allowed by the justice before entering judgment by default, the defendant appeared for the purpose of trying the cause.

Held, that the judgment should be reversed, the inquest having been allowed out of the usual time, in consequence of misstatements to the justice by the plaintiff. *Bach v. McCann,* 256

12. It seems, that the mere fact, that the justice suspended the trial of one cause to take an inquest in the other, is no objection to the regularity of the judgment entered on such inquest. *Ibid.*

13. Upon the return of a summons in a district court, the clerk has the power, in the absence of the justice, to adjourn the cause, but not to join issue.

In such a case, the proper time for demanding a jury is not upon the return day, but after joining issue, on the day to which the cause has been adjourned. *Meach v. Brown,* 257

14. Whether the justice of a district court may open a judgment rendered by him on default through mistake—*quære?* *Scranton v. Levy,* 261

15. It is too late to demand a jury in a district court, upon a day to which the cause has been adjourned after joining of issue. *Mason v. Campbell,* 291

16. A defendant cannot object to the regularity of adjournments made by his consent, or upon his motion. His consent is a waiver of the irregularity. *Ibid.*

17. The failure of the justice of a district court to give judgment within four days after the cause is submitted to him, deprives him of jurisdiction, and renders the judgment a nullity.

Whether the consent of the parties to the cause, extending the time for giving judgment, relieves the difficulty—*quære?* *Triseman v. Panama R. R. Co.,* 300

18. The act of March 26, 1819, prohibiting justices' courts from exercising jurisdiction in actions for seamen's wages, deprives the justice of jurisdiction, only when the action is against the owners, master, or commander of a ship or vessel upon a contract made with the owners, commander, or master.

The prohibition does not apply to an action on a contract of a shipping agent to pay advance wages on the seaman's

proceeding to sea in the vessel, pursuant to the shipping articles. *Loftus v. Clark*,

310

19. To title of the defendant to a lot in question not having been disputed upon the trial—*held*, that the title to lands did not go so in question, so as to deprive a district court of jurisdiction of the cause. *Nixon v. Jenkins*, 318

20. The defendant having failed to appear in a district court, on the return of a summons, the cause was adjourned to a subsequent day, and the plaintiff left the court-room. The defendant subsequently appeared, and the justice noted his appearance and received his answer. He demand led a jury, but the justice refused it, upon the ground that he had no power to issue a *venire* after the adjournment. Upon the adjourned day the defendant renewed his demand, which was again refused. *Held*—error. (INGRAHAM, J., dissenting.)

A mere adjournment does not deprive a party of the right to demand a jury, but only an adjournment made after issue joined.

A jury cannot be demanded until issue has been joined.

If made by the defendant during the absence of the plaintiff from the court-room, it is the defendant's duty to bring home to the plaintiff notice of such demand.

A justice of a district court has the right, in the exercise of a sound discretion, to permit a defendant to appear and answer at any time before proof is taken on behalf of the plaintiff. Such an appearance carries with it all the rights incidental to a regular appearance on the return of a summons—*e. g.*, the right to demand a jury. *Mead v. Darragh*, 395

21. *Per INGRAHAM, J., dissenting.*—The justice of a district court has no right to receive an appearance and answer of a defendant after the cause has been adjourned upon his default and the plaintiff has left the court-room. Such an appearance and answer being themselves irregular, and no issue being properly joined, the defendant has no right to demand a jury. *Ibid.*

22. Where the defence to the plaintiff's claim consists of a counter-claim in favor of the defendant, and the plaintiff's claim

is proved, the defendant must substantiate his counter-claim to the entire satisfaction of the justice, before the plaintiff can be charged with any part thereof. Where the counter-claim is for damages, and the justice cannot decide whether the injury should be borne by the plaintiff or the defendant, he has no right to divide the loss between the parties, but, unless affirmatively satisfied of the justice of the counter-claim, must disregard it, and render judgment for the plaintiff's claim. *Prentiss v. Sprague*, 428

23. It is improper for a justice to render judgment while the counsel of one of the parties is summing up the cause, *Ibid.*

24. In an action upon a premium note in a district court, an averment in the complaint—after setting out the note, that “the company did, in the years 1850-1855, make assessments upon the said notes, and required the defendants to pay a certain portion thereof, which assessments the defendants have neglected and refused to pay”—is a sufficient averment of the making of assessments, and of a demand and refusal to show a cause of action. If the defendant wishes more particular information, he must apply to have the pleading amended.

To sustain such an action, it is not necessary for the company to show that they have sustained losses. The statute vests in the directors the right of making assessments whenever they shall deem it necessary, for the honorable and prompt payment of losses, or of the expenses of the company, and the right of deciding when such assessments are necessary.

But only the amount actually assessed can be recovered in such action; and a resolution, laying an assessment of \_\_\_\_ per cent., is a nullity, and can form no basis for a claim upon the note. *St. Lawrence M. Ins. Co. v. Paige*, 430

See APPEAL, 8, 13, 30, 43.

ATTACHMENT, 1.

CONSTABLE, 1, 2.

CORPORATIONS, 2.

COUNTER-CLAIM, 4.

INFANT, 1.

MARINE COURT.

PARTIES TO ACTIONS, 1.

SUMMARY PROCEEDINGS TO RE-

COVER POSSESSION, &c., 1, 2, 3.

SUPPLEMENTARY PROCEEDINGS, 3.

USE AND OCCUPATION, 3

## L

## LANDLORD AND TENANT.

1. The landlord has no right to enter upon his tenant's premises during the term of the lease, without the tenant's consent, although the tenant has removed from the premises, and is not in actual possession of them—no right of entry being reserved in the lease. *Shannon v. Bury*, 39

2. Such an entry upon the tenant's premises is a trespass, and the landlord is liable in an action by the tenant for damages therefor. *Ibid.*

3. But, the tenant having removed from the premises, there being no evidence of actual damage, and no circumstances from which improper motives on the part of the landlord could be presumed—held, that the tenant was only entitled to nominal damages. *Ibid.*

4. An interference by the landlord with the person of the tenant, although on the demised premises, does not constitute an eviction. It is a trespass only, and the remedy of the tenant is by action for the assault. *Valet v. Herner*, 149

5. The use of a privy by a landlord in a passage-way leading to the demised premises, and which was there at the time of the hiring, although so used as to be offensive to the tenant, does not of itself constitute an eviction, the tenant not being actually deprived of any part of his premises. *Ibid.*

6. An assignee of a lease is liable to the original landlord, only in respect of his possession, and then only in case he is assignee of the whole term. *Bagley v. Freeman*, 196

7. A general assignment for the benefit of creditors, which does not specifically mention the lease, does not, of itself, make the assignee liable for rent as assignee of the lease. *Ibid.*

8. His entry upon, and occupation of the demised premises are sufficient *prima facie* to charge him with the rent as assignee; but he may rebut the presumption arising from such occupation, and

prove that he refused to take an assignment of the lease. *Ibid.*

9. The non-performance by the landlord, within the time specified, of an independent agreement indorsed upon the lease to make certain improvements in the demised premises, does not discharge the whole contract, so as to relieve the tenant from liability for rent, and release the surety.

In such case it seems that the tenant may sue for damages, or make the improvements and deduct the expense from the accruing rent. *Ellis v. McCormick*, 313

10. A sealed agreement of lease, signed by an agent in his own name, describing himself as "agent" of the owner of the premises, does not bind the owner.

A special agreement under seal, executed by an agent, must appear on its face to be the contract of the principal, or the principal will not be bound.

In an action by lessee against lessor, to recover damages for failure to give possession, the rule of damages is the difference between the yearly value of the premises and the rent reserved.

It is erroneous, in such action, to receive evidence of the amount plaintiff has been compelled to pay to obtain premises, instead of those leased him by defendant. *Dean v. Roesler*, 420

11. In an action for rent upon a written contract to hire, signed by the tenant only, it is to be presumed, in the absence of evidence to the contrary, that the landlord's agreement to let was also in writing.

In such an action, evidence of a parol agreement, on the part of the landlord, to repair, is inadmissible, except it is preceded by proof that the landlord's agreement to let rested in parol. *Meyer v. Moller*, 491

12. In a contract of letting, there is no implied warranty that the premises are tenable. *Ibid.*

See ACTION, 1.

Covenant, 1.

LEASE, 2, 7, 8.

SUMMARY PROCEEDINGS, 1, 2, 3.

SURRENDER, 2.

UNDER-TENANT, 1, 2, 3.

USE AND OCCUPATION, 3.

## LEASE.

1. In an action against a surety upon a lease, it is not competent for the defendant to show a verbal agreement, contemporaneous with the execution of the lease, that it might be surrendered at the will of the tenant, and that such surrender should operate as a discharge of the surety, and a remission of three months' prior rent. *Brady v. Peiper*, 61

2. In an action by lessee against lessor to recover damages for refusal to give possession of the demised premises, it is no defence that the plaintiff hired the premises intending to keep a house of prostitution therein.

The mere avowal of an intent of the lessee to employ the leased property in the prosecution of an unlawful business does not constitute an offence, nor does it entitle the lessor to repudiate his contract. *O'Brien v. Brietenbach*, 304

3. A covenant for quiet enjoyment, expressed or implied in a lease, relates only to title, and not to the undisturbed enjoyment of the premises demised, when there has been no eviction or entry under assumption of title. *Edgerton v. Page*, 320

4. Where a lease of land is made upon any condition—such as the payment of rent—the condition is annexed to the land, and goes with it, and the assignee of the lessee, if he accepts the assignment, takes the estate subject to the condition, and is liable for the payment of the rent so long as he continues assignee.

*It seems* this liability is at an end when he assigns to another, even though he assigns to an irresponsible person for the express purpose of avoiding future liability. *Journey v. Brackley*, 417

5. But there is a distinction between an express or specific assignment, by a lessee, of his interest in a lease, and an assignment made by him of all his property for the benefit of creditors. In the former case, the assignee, by accepting the lease, creates a privity of estate between himself and the lessor, and having established that relation, it is immaterial whether he enters upon and enjoys the land or not. But in the case of a general assignment for the benefit of creditors, although the assignees accept the assignment, and enter upon the execution of the trust, whether they will be-

come assignees of a lease, held by the insolvent at the time of the assignment, is altogether at their election.

Such an election must be signified by some unequivocal act. Either the lease must be specifically mentioned in the assignment, or the assignees, after accepting the trust, must have acted in such a way, in respect to the leasehold premises, as to show that they have elected to take the interest which the insolvent before had therein. It will not be implied from the mere acceptance of a general assignment. *Ibid.*

6. The assignees for the benefit of creditors have a reasonable time to ascertain whether the lease can be made available to creditors or not, and during that time may take such steps as they may consider necessary for the purpose of making the property productive. What is a reasonable time for that purpose, considered.

*It seems* that the same principles apply to executors in respect to a decedent's estate.

What facts are sufficient evidence of an intention on the part of the assignees in such a case to accept the lease, considered; and numerous cases upon the question collected and examined. *Ibid.*

7. J. leased to T. & R. a store for a term of years. Pending the lease, T. & R. failed, and made a general assignment of all their property, including a stock of goods in the store, to B. & U., who took possession, notified J. that they did not intend to take the building, and would have nothing to do with the lease; but remained there for thirty-six days, selling the insolvent assignor's stock—part of it at private sale, and part of it at auction. At the end of that time, and before the quarter's rent became due, they vacated the premises, and J. retook possession, and collected rent from some under-tenants of T. & R., occupying a part of the demised premises. *Held*—

I. That these facts did not show an election on the part of B. & U. to become assignees of the lease, so as to render them liable for rent. Such an entry upon the demised premises for the purpose of disposing of the insolvent's effects, accomplished in an expeditious and summary manner, is no evidence of an election on their part to accept and make use of the lease.

II. That no action could be maintained

against them on these facts for use and occupation. The leasehold estate remained in T. & R., the insolvent assignees. The privity of estate had never been changed; and T. & R. were in legal possession under a valid subsisting lease, the occupation of B. & U. being solely by their permission and authority. *Ibid.*

8. S. leased certain premises to N., by whom the lease was assigned to Sch. He assigned the lease in turn to W., taking an agreement from him to pay the rent, and from R. an agreement as surety for the punctual payment thereof.

*Held*, that the agreements were without consideration, and void.

Sch. was liable for rent only so long as he remained assignee of the lease, and was relieved of that liability by his assignment of the lease. W., by his acceptance of the assignment, became liable to S., the original landlord; and his agreement to pay the rent to Sch., his immediate assignor, and R.'s agreement as his surety, were therefore without consideration; and neither he nor the surety was liable to Sch. or his assignee thereon. *Stoppani v. Richard*, 509

See ACTION, 1.

COVENANT, 1.

LANDLORD AND TENANT, 1, 6, 7.

UNDER-TENANT, 1.

USE AND OCCUPATION, 3, 4.

#### LIEN.

1. A lien exists either by the express agreement of the parties, or is implied from their mode of dealing, or it follows from the established usage of trade, or it is founded upon the immemorial recognition by the common law of a right to it in special cases.

*It seems* the lien is recognized in the case of every bailee for hire who takes property in the way of his trade and occupation, and by his labor and skill imparts additional value to it. *Trust v. Person*, 292

2. If a special agreement for a particular mode of payment, or for payment at a future period, is made in any case in which a right of lien would otherwise be implied, the lien does not exist. If such an agreement is made before the claimant acquires possession of the chattel, no lien is created,

if made thereafter it is a waiver of the lien. *Ibid.*

3. By agreement between P. and T., P. was to have the right to store, repair, and sell piano-fortes in T.'s store, for which privilege he was to pay \$25 00 per month at the expiration of each month.

*Held*, that T. had no lien on the piano-fortes for the amount due under this agreement. *Ibid.*

4. The proper mode of enforcing a common law lien against chattels discussed. *Per Brady, J.* *Ibid.*

See COMMON CARRIER, 13, 15.

#### LIMITATIONS OF ACTIONS.

1. No acknowledgment or promise is sufficient evidence of a new or continuing contract, to take a case out of the operation of the statute of limitations, unless contained in some writing signed by the party to be charged thereby.

The effect of the enactment of the provision in the Code of 1849, requiring such promise to be in writing, is to establish a new rule of evidence for all cases, where the action is brought after the period limited by statute. *Hope v. Roger*, 544

#### LOG-BOOK.

See SHAMAN'S WAGES, 11, 12, 13, 14.

#### ■

#### MALICIOUS PROSECUTION.

See FALSE IMPRISONMENT, 1, 2, 3.

#### MARITIME LIEN.

See SEAMAN'S WAGES, 6, 7

#### MARINE COURT.

1. Judgment having been rendered in the Marine Court in the plaintiff's favor, on the defendant's default, and an order having been made opening the default, on condition of the payment of certain

costs, and setting the cause down for trial for a day certain, the defendant not appearing on that day, and not having paid the costs, on an affidavit of that fact, the court vacated the original order opening the judgment. *Held*—regular. *Mitchell v. Menkle*, 142

2. On appeal from the Marine Court, this court can look only at the return of the justice, and will not review matters resting in the discretion of the court below, or questions of practice merely, unless they affect the substantial rights of the parties, and are returned by the justice as part of the proceedings in the cause. *Ibid.*

3. The decisions of the Marine Court, upon questions respecting its practice, and not affecting the merits of an action, are not the subject of review in this court. *Brown v. Jones*, 204

4. The general term of the Marine Court has no power, on appeal from a judgment, to make an absolute order that it be modified by increasing the amount.

Where, however, a judgment appealed from is palpably too small in amount, an order may be made directing that there be a new trial, unless the defendant consents to a specified increase. *Murphy v. Long*, 309

5. Where a judgment is reversed, upon appeal, at the general term of the Marine Court, for errors occurring upon the trial before a single judge, or for insufficiency of proof, a new trial should be awarded. *Irwin v. Lawrence*, 352

6. It is only in cases where the facts involved in the action are ascertained at the trial, either by special verdict or in some other proper mode, that a final judgment may be given, at the general term, in favor of the party appearing to be entitled thereto, and adverse to the judgment appealed from. *Ibid.*

7. The Marine Court, at general term, should not reverse a judgment appealed from, and order final judgment in favor of the appellant, where it appears, or may reasonably be presumed from the case presented, or the nature of the controversy, that upon a new trial additional facts might be established sufficient to charge the appellant with liability in the action.

In such a case, on reversing a judgment in favor of the plaintiff, a new trial should be awarded. *Journeay v. Brackley*, 447

See **APPEAL**, 1, 2.  
**JUSTICES' COURT PRACTICE**,  
**USE AND OCCUPATION**, 3.

#### MARRIED WOMEN.

1. The wife having, subsequent to her marriage, permitted her sole and separate property to be transferred to the custody of her husband, and used in a business carried on by the two, whether she will not be held to have appropriated it to the use of her husband, and rendered it liable to the claims of his creditors—*quare*? *Sherman v. Elder*, 178

2. The sheriff having, in such a case, levied on a stock of goods purchased with the income of such a business, and the wife having interposed only a general claim to the entire stock, whether she will not be afterwards estopped from claiming a few specific articles, upon the ground that they were hers at the time of her marriage, no such claim having been made at the time of the levy—*quare*? *Ibid.*

3. Whether a wife can, without the concurrence of her husband, assign a claim for damages for tort—*quare*? *Ibid.*

See **ARREST**, 1.  
**COUNTER-CLAIM**, 4.  
**HUSBAND AND WIFE**, 1, 2, 3.  
**PROMISSORY NOTES**, 8, 9, 10.

#### MASTER AND SERVANT.

See **NEGLIGENCE**, 1, 2.

#### MEMORANDA.

See **PROTEST**, 1.

#### MERGER.

1. In an action by the assignee of B. & F. against G., the latter interposed, as a set-off or counter-claim, a claim held by him against the assignors B. & F. Upon

the trial it appeared that he had recovered judgment therefor prior to this action.

*Held*, that the justice erred in admitting evidence of the original claim on which such judgment had been recovered. The claim was merged in the judgment, and could not be used as evidence of indebtedness. *Ives v. Goddard*, 434

through negligence, the burden of proof is on the defendant to show that the plaintiff was himself guilty of such neglect as would prevent his recovery, by reason of his contributing to the injury complained of. *De Benedetti v. Mauchin*, 213

#### METROPOLITAN POLICE COMMISSIONERS.

1. The Board of Metropolitan Police Commissioners are not state officers, within the meaning of chap. 488 of Laws of 1851, p. 920. They are officers of a locality or district, and, in a proper case, may be restrained by this court, in the exercise of its equity powers, in like manner and to the like extent as other local or county officers. The duty of enforcing *all* the public ordinances of the city of New York, especially those applicable to police or health, is imposed by law upon the Board of Metropolitan Police Commissioners. *The N. Y. & Harlem R. R. Co. v. The Mayor, &c., of N. Y.*, 562

2. In an action brought against a master and servant, to recover for injuries caused by the negligent act of the servant while engaged in the master's business—*held*, that a refusal of the justice to charge that the plaintiff must show that the accident was occasioned by the negligence of the servant, was erroneous. *Ibid.*

3. The fact, that the carrier has done what is usual, is not sufficient to exempt him from a charge of negligence. He must show that he has done what was necessary to be done under all the circumstances. *Wing v. N. Y. & Erie R. R. Co.*, 235

4. A man cannot recover damages for injuries occasioned to his property by the negligence of another, when he has himself been guilty of an act of negligence that contributed to the accident. *Menges v. N. Y. & Harlem R. R. Co.*, 425

5. The horse of the plaintiff escaped from his stable at night, and fell into a cut in the public highway, through which the railroad track of the defendants passed.

*Held*, that it was the duty of the plaintiff so to secure his horse that he could not stray into the public streets, and that, if he escaped and any accident occurred to him in consequence thereof, the plaintiff must suffer the consequences.

Whether the defendants would otherwise have been rendered liable, by reason of their failure to put a fence along the line of the cut through which their road passes—*querre?* *Ibid.*

#### SEE SUPPLEMENTARY PROCEEDINGS, 3.

APPEAL, 8.  
EXECUTION, 2.

#### MORTGAGE OF CHATTELS.

1. A mortgagor, holding a chattel mortgage, which provides that the mortgaged property shall remain in the custody of the mortgagor until default is made in the payment of the mortgage, cannot take possession of the property before such default, without showing some disposition of the property, by the mortgagor, calculated to destroy the security afforded him by the mortgage. *Van Hassell v. Borden*, 128

6. The owner of a machine, made by him to be hired out to others for a particular purpose, is under an obligation to make such machine sufficiently strong to answer the purpose intended. If an injury occurs through a defect in it, the owner is liable.

Wherever the law imposes a duty on a man, a neglect of that duty renders him liable to any one injured by such neglect.

#### N

#### NEGLIGENCE.

1. In an action for injuries occurring

SEE APPEAL, 11.  
CHATTELS, 1.  
EXECUTION, 1.

The authorities upon this point collated and examined.

And he is equally liable, whether the injury is occasioned by a neglect or disregard of some special obligation or duty due to the injured party, or by a neglect or disregard of a public duty or obligation. *Cook v. N. Y. Floating Dry Dock Co.* 436

7. L employed S. and L to repair a ship, and hired the defendants' dry dock for the purpose of making the repairs, and L erected a scaffolding upon standards attached to the dock, and belonging to the defendants, and which, by the rules of the defendants, they were required to use for that purpose. Owing to the insufficiency of the standards the scaffolding gave way, and C., who was employed upon it by S. and L., in making repairs, fell upon the dock, and was injured.

*Held*, that the defendants were liable to him in an action for damages therefor, although there was no privity of contract between him and them. *Ibid.*

See ACTION, 3.  
DAMAGES, 6.

#### NEW YORK CITY.

1. The provision of the amended charter of the city of New York, passed April 14th, 1857, that "no member of the common council shall receive any compensation for his services as such member," applies to the members elected before the passage of that act, and deprives them of compensation for all services rendered after the act took effect. The act is not unconstitutional.

I. It is neither a private nor a local bill, and does not come within the provision of the constitution, that no such bill shall embrace more than one subject, and which shall be expressed in the title. Art. 3, § 16. A statute cannot be termed local or private which provides for the government of a considerable portion of the territory and population of the state, delegating powers of legislation, and authorizing the passage of laws, as well as the administration of them, which, in their operation, affect all the citizens of the state, who, either in their persons, come within the range, or whose property is within the limits, of that jurisdiction.

II. Nor can the provisions of the amended charter be said to be of more than one

subject. The section prohibiting aldermen from acting as judges of the Courts of Oyer and Terminer and Sessions, is proper and consistent with the other provisions of the act, and a necessary part of the new system thereby created.

III. The section, providing a punishment for bribery offered to or committed by an officer of the city, is not a subject separate from, or unconnected with, the other provisions of the charter, within the meaning of the constitution.

IV. If there were any doubt upon these points, it would not be necessary to declare the whole act void. So much as is consistent with the title would be sustained, and the remainder only invalidated.

V. Nor is it any objection to the constitutionality of the charter, that, by the 44th section, it takes away the compensation of an officer during his term of office. There is no doubt of the power of the legislature to do this.

The 54th section of the charter, providing that no right accrued before the act took effect should be prejudiced thereby, does not apply to prospective compensation of public officers, not then earned. *Phillips v. Mayor, &c., of N. Y.* 483

2. This court has jurisdiction of all actions against the corporation of the city of New York, upon any cause of action whatever, whether it be of a legal or equitable nature. *So held* in an action to restrain the enforcement of an ordinance of the corporation, upon the ground that it was passed in violation of an agreement entered into by the corporation with parties affected by the ordinance; and also that it was illegal and unauthorized by law. *N. Y. & Harlem R. R. Co. v. The Mayor, &c., of N. Y.* 562

3. The Board of Metropolitan Police Commissioners are not state officers, within the meaning of Chap. 488 of Laws of 1851, p. 920. They are officers of a locality or district, and, in a proper case, may be restrained by this court, in the exercise of its equity powers, in like manner and to the like extent as other local or county officers. *Ibid.*

4. The only limitation upon the legislative power and control of the corporation of New York city over the streets within its limits is, that they shall be appropriated to no use or purpose which is

not alike free and common to all travelers. This power cannot be surrendered, either in whole or in part, into the hands of any person or persons, without previous legislative sanction. *It seems* that converting the streets to railroad purposes, and permitting rail tracks to be laid upon them, and used by an association or individuals for carrying merchandise or passengers for hire, is devoting them to an exclusive use, and cannot be permitted without the express authority of the legislature.

*Ibid.*

5. Although the power to grant this permission must be derived from the legislature, yet the corporation, by exercising it, is not deprived of its control over the streets in all other respects; and it may, in the grant, impose such conditions respecting the manner in which the rail tracks shall be used, and upon which the future use thereof shall depend, as it may think proper.

*Ibid.*

6. By the act of the legislature incorporating the N. Y. & H. R. Co., passed April, 1831 (Laws 1831, p. 323), it was provided, that nothing contained in it should authorize the construction of their railway across or along any of the streets of the city of New York without the consent of the mayor, &c., who were thereby authorized to grant permission to so construct it, or to prohibit its construction; and, if constructed, to regulate the time and manner of using the same, and the speed with which carriages might move on it. In December, 1831, on the application of the company, an ordinance was adopted by the mayor, &c., permitting the track to be laid in certain streets, providing, however, that if, after its construction, it should, in the opinion of the mayor, &c., constitute an obstruction or impediment to the future regulation of the city, or the ordinary uses of any street or avenue, the company should forthwith provide a satisfactory remedy therefor, or remove the rails; and, also, expressly reserving and retaining to the mayor, &c., the right to regulate the description of propelling power to be used on the track, and the speed of the same, as well as all other power reserved in the act of incorporation. The ordinance was to have no binding force, or go into effect, until the railroad company, in writing and under seal, covenanted to abide by and perform its conditions. An agreement of this nature was executed and filed in the office of the

city comptroller, and thereupon the company laid their track on the Fourth avenue and other streets. In December, 1854, the mayor, &c., of New York prohibited the running of steam engines, or locomotives, on the track of the company on Fourth avenue south of Forty-second street after eighteen months from that time.

*Held.*—I. That the ordinance was valid, and was not a violation of any of the franchises granted to the railroad company. II. That granting permission to lay the track did not deprive the mayor, &c., from subsequently regulating its use by the company. III. That the agreement of the company was valid as a *restriction* upon its corporate power, and was in no sense a *transfer* of it. IV. That the corporation can make no valid contract which will interfere with its legislative control over the streets; and any such contract, if made, is revocable at its pleasure.

*Ibid.*

7. A corporation, like an individual, may be bound by an implied contract, provided the subject matter of it is within the scope of its corporate authority.

*Ibid.*

8. Courts are bound to assume, where a discretion is vested in a municipal body, exercising functions of a legislative character, that good reasons existed for doing an act which was the result of such a discretion.

*Ibid.*

9. The duty of enforcing *all* the public ordinances of the city of New York, especially those applicable to police or health, is imposed by law upon the Board of Metropolitan Police Commissioners. The ordinance in question might be classed under either head.

*Ibid.*

#### NEW TRIAL.

See APPEAL, 14, 38.

#### NON-RESIDENT DEBTORS.

See ATTACHMENT, 1.

#### NONSUIT.

1. A judgment of nonsuit is no bar to another action for the same cause, although evidence upon both sides has been adduced, and the cause has been regular-

ly submitted to the justice by both parties for decision, if a motion for a nonsuit has been made and the decision thereon has been reserved. *Seamen v. Ward*, 52

2. A judgment of nonsuit is no bar to another action for the same cause, where the nonsuit was granted because the plaintiff's evidence failed to make out a case. *Tattersall v. Hass*, 56

## NUISANCE.

1. Anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another is a private nuisance. *Crupsey v. Murphy*, 126

2. A fat-boiling establishment is a nuisance within the meaning of this rule, if it infect the air with noisome smells, or with gases injurious to the health. *Ibid.*

3. Proof that the plaintiff cannot enjoy his property in a full and ample manner, by reason of the acts of the defendant—as, for example, that he cannot find tenants for his house on account of the noisome odors produced by the nuisance complained of—is sufficient proof of special damage to sustain an action to recover compensation therefor. *Ibid.*

4. Although the damages awarded in such an action by the court below (in this case, the Marine Court) may seem to be excessive, this court will not disturb the judgment on that account. *Ibid.*

5. The public exhibition of obscene pictures is an offence indictable at common law. Such pictures are regarded as a common nuisance, and should be destroyed when the fact of publication is established. It is the policy of the law to destroy all such articles, and the loss thus occasioned to the owner is a part of the punishment inflicted for the offence of publicly keeping or exposing them. *Willis v. Warren*, 590

See NEW YORK CITY, 4, 6.

## ①

## OBSCENE PICTURES.

See NUISANCE, 5.

## P

## PARENT AND CHILD.

1. In an action against a husband for clothing furnished to his infant children, the opinion of a witness that they were necessary for them is not sufficient evidence of that fact. The circumstances which rendered the furnishing of the goods necessary should be shown. *Poock v. Miller*, 108

2. To sustain such an action, it must appear that the articles supplied were furnished with the assent, or by the authority of the father, or to keep the children from absolute want, or that there was absolute necessity for them. *Ibid.*

3. No action can be maintained against a father for clothes furnished to his minor child, upon the ground of their necessities, where it appears that the child is well provided for by the father. *Henry v. Bella*, 156

4. But evidence that a minor child ordered clothes of a party, for which his father subsequently paid without objection, is sufficient to warrant a finding of authority from the parent to the child to incur such obligations, and make such contracts on behalf of the father with the same person. *Ibid.*

## PARTIES TO ACTIONS.

1. A justice has no power to compel a party to the suit to testify, when he is not placed on the stand by his adversary. Unless called by his opponent he cannot be made a witness. *McCormick v. Mulvihill*, 131

2. An action to recover a penalty for a violation of the law of 1847, concerning the pilotage of vessels in the East River at Hell Gate, should be prosecuted in the name of the master warden of the port of New York, and not in the name of the people of the state. *The People v. Downing*, 271

See ACTION, 2.

## PARTNERSHIP.

1. A composition deed, though under

seal, if executed by one of the partners in the firm name, is binding upon the partnership. *Beach v. Olendorf*, 41

2. In an action against two defendants, as partners upon a note made in the firm name, the admission by one defendant of the partnership, and of the making of the note, is not sufficient evidence to sustain a judgment against the other. *Rushmore v. Hutchins*, 123

3. Although individuals may be partners in real estate, the statement of one to that effect will not bind the other without further proof of joint ownership. *Nixon v. Jenkins*, 318

See **APPEAL**, 6.

**PRINCIPAL AND AGENT**, 2.

**REFERENCE**, 4.

#### PASSENGER CARRIERS

See **BAGGAGE**.

**COMMON CARRIERS**.

#### PAYMENT.

See **ACCORD AND SATISFACTION**, 1, 2.

**ACTION**, 8.

**EXECUTION**, 2.

#### PLEADING.

1. The defendant, by pleading to the merits, waives all defects and irregularities in the summons, although an objection may have been made thereto, prior to joining issue, and reserved to be passed upon at the time of trial. *Cussing v. Broach*, 49

2. In an action by a corporation it is not necessary to specify by date and title the acts amending the act incorporating it. It is sufficient to designate that act particularly, and to refer generally to the other acts amendatory thereof. *Sun Mutual Ins. Co. v. Dwight*, 50

3. A complaint is sufficient which alleges everything which the plaintiff would be required to prove at the trial. In a complaint upon a promissory note, an averment that the note, "before the maturity thereof, and for value received, lawfully came into the possession of the

plaintiffs," is a sufficient averment of ownership and title. *Lee v. Ainslee*, 277.

4. In an action on a promissory note, an answer which simply denies that the defendants indorsed and delivered the note to the plaintiffs, without denying that they indorsed the note, or setting up any matter assailing the plaintiffs' right to the possession thereof, is frivolous. *Kamlah v. Saller*, 558

See **COUNTER-CLAIM**, 1, 2, 3, 4, 5.  
**DEMURRER**.  
**EVIDENCE**, 4.  
**JUDGMENT**, 1.  
**JUSTICES' COURT PRACTICE**, 24.  
**PRACTICE**, 3, 4.  
**REFERENCE**, 4.

#### PLEDGE.

1. G. having, without the knowledge or consent of the owner, pledged with defendant, a pawnbroker, property belonging to P., whether the defendant has any lien upon it for his advance—*quere?* *Duell v. Cudlipp*, 166

2. The pawn-ticket having been assigned to P., and notice of her ownership of the property and of the assignment of the ticket to her having been given to the defendant, he is liable to her for the value of the property, if he afterwards delivers the property to the original pledgor. *Ibid.*

See **ARREST**, 1.

**PROMISSORY NOTES**, 16.

#### POLICY OF INSURANCE.

See **INSURANCE**, 1.

#### POWERS.

See **TRUSTS**, 1, 2.

#### PRACTICE.

1. To entitle the defendant, in an action brought in this court, to an order removing it into the Circuit Court of the United States, it must appear that he is an alien or a citizen of another state, and that the action is brought by a citizen of this state. And he is not entitled to such

an order if he is a citizen of another state, unless all the plaintiffs are severally citizens of this state. *Dennistoun v. N. Y. & N. H. R. R. Co.*, 62

2. In an action brought by four plaintiffs, three of whom were aliens and one a citizen of this state, against a railroad corporation created by the laws of another state—held, that an application to remove the action into the United States Circuit Court was properly denied. Such a corporation is, within the meaning of the Judiciary Act of 1789, a citizen of the state incorporating it, notwithstanding, by a law of this state, it has been authorized to continue and construct its road through and over a part of this state, with liberty to purchase and hold real property here for such purpose. *Ibid.*

3. Leave will not be granted to file a supplemental complaint which alleges any fact known to the plaintiff at the time of commencing the action. *McMahon v. Allen*, 103

4. It is improper to join in one complaint prayers for relief against the defendant individually, and in his capacity as executor. *Ibid.*

5. A cause was tried in January, 1853, and the complaint dismissed. The plaintiff, for the purpose of moving for a new trial, served a proposed case, and on the same day the defendant's attorney entered into a stipulation, that the defendant's proceedings should be stayed, until the case, or bill of exceptions, was settled and argued, and finally disposed of. Amendments to the case were served in due time, and seven days thereafter notice of settlement was given by the plaintiff's attorney, and the case and amendments were subsequently left for settlement at the court-room for the judge who tried the cause. No further proceedings were taken in the cause by the plaintiff, and the case was not settled. In June, 1854, judgment was entered for the defendant, and notice thereof in writing was given to the plaintiff's attorney. No appeal was taken from this judgment, nor was any motion made to set it aside. In December, 1855, a motion was made by the plaintiff for the settlement of the case. Held, that it was properly denied.

1. No appeal having been taken from the judgment, and the time to appeal hav-

ing expired, the settlement of the case would be of no utility.

II. The delay of the plaintiff in making the application was a complete answer to it.

III. The defendant's practice was regular. The stipulation did not operate as a perpetual stay. The notice of settlement of the case not having been served within the required time, the proposed amendments were to be deemed agreed to under Rule 15; and the case, not having been filed within ten days thereafter, was to be deemed abandoned under Rule 17, and so "finally disposed of," within the meaning of the stipulation. *Robinson v. Hudson R. R. Co.*, 144

6. The plaintiff has a right to discontinue, on payment of costs, at any time before the time to reply has expired, notwithstanding the interposition of a counter-claim in the defendant's answer. *Oaks-mith v. Sutherland*, 265

7. An omission to comply with the rule, requiring each cause of action to be numbered and separately stated, is not the subject of a demurrer. *Per Brady, J. Badger v. Benedict*, 414

8. In an action upon a draft, or check, for \$3,768, the defendant, in his answer, alleged that the check was given in payment of certain property purchased by him from the plaintiff, and warranted by the latter to be of a certain quality; averred a breach of the warranty, and claimed to recoup \$500 damages therefor.

Held—a proper case for an order, under § 244 of the Code, directing the defendant to satisfy part of plaintiff's claim admitted to be due. *Baker v. Nussbaum*, 549

9. Rule 35 of the court, allowing twenty days for the payment of costs, or the performance of any condition imposed by an order, has no application to such an order, which may be enforced either as a judgment or as a provisional remedy. *Ibid.*

10. In an action brought against a firm of the name of L. K. & Brothers, M. K. was, by mistake, named as defendant instead of H. K. Although no summons or complaint was ever served upon him, he appeared and answered, denying that he was a partner in the firm. The plaintiff then moved for leave to discontinue

against him without costs, and to substitute the name of H. K. for that of M. K., wherever it occurred in the summons and complaint. On appeal from the order granting the application—*Held*, I. That the order rested in the discretion of the court, and was not appealable.

II. That the circumstances of the case fully warranted the order as granted. *Waterbury Mfg. Co. v. Krause*, 561

11. When a motion is brought before the court upon an order to show cause, the order is regarded as a notice of motion, and the party obtaining it entitled to open and close the argument. *N. Y. & Harlem R. R. Co. v. The Mayor, &c., of N. Y.*, 562

12. A statement, that the plaintiff sold to the defendant a quantity of meat, in the years 1854 and 1855, and that there was justly due to the plaintiff, upon such sale, a certain specified balance, is insufficient to sustain a judgment thereon. Such a judgment is void, and cannot be sustained by proof *aliumde* of the facts in detail, out of which the indebtedness arose. *Neusbaum v. Keim*, 520

See ACTION, 2, 10, 11.

ABATEMENT, 1, 2.

AMENDMENT, 1.

APPEAL, 34, 40.

ARREST, 1.

ATTACHMENT.

BAIL, 1.

COSTS, 1, 2.

COUNTER-CLAIM.

DEFAULT.

DEMURRER.

EVIDENCE, 6.

EXCEPTIONS, 2, 3, 4.

EXECUTION, 2, 3.

INJUNCTION.

JUDGMENT, 3.

JURISDICTION.

JUSTICES' COURT PRACTICE.

NEW TRIAL.

NONSUIT.

PARTIES TO ACTIONS.

PLEADING.

PROMISSORY NOTES, 17.

RECEIVER.

REFERENCE.

SET-OFF.

SUMMARY PROCEEDINGS.

SUPPLEMENTARY PROCEEDINGS.

VERDICT.

WITNESS, 1.

#### PRINCIPAL AND AGENT.

1. An undisclosed principal may always sue to enforce rights acquired on his behalf by his agent, though he does so subject to any equities which the defendant may have against the agent. *Van Lien v. Byrnes*, 133

2. In an action to recover for the rendition of services, the defendant cannot avail himself of the defence, that he acted only as agent, or of a firm of which he was a partner, unless he disclosed the fact of the partnership or agency at time of making the contract upon which the action is brought. Having contracted for the service in his own name, he was personally liable. *Cabre v. Sturges*, 160

3. A sealed agreement of lease, signed by an agent in his own name, describing himself as "agent" of the owner of the premises, does not bind the owner.

A special agreement under seal, executed by an agent, must appear on its face to be the contract of the principal, or the principal will not be bound. *Dean v. Roester*, 420

See LANDLORD AND TENANT, 10.

PROMISSORY NOTES, 13, 14.

WARRANTY 2.

#### PRIVITY OF CONTRACT.

See ACTION, 8.

LEASE, 5.

NEGLIGENCE, 7.

#### PRIVITY OF ESTATE.

See LEASE, 5.

#### PROMISSORY NOTES AND BILLS OF EXCHANGE.

1. The payee and first indorser of a promissory note gave to the holders, at its maturity and in renewal, his own note, indorsed and secured by a pledge of stock, for the purpose of obtaining an extension of time. It was accepted by the holders. *Held*, that this arrangement, having been made without the knowledge of the second indorser, discharged him. *Kelly v. Jenkins*, 73

2. Where a note is made for the purpose of procuring a loan of money thereon, and it is delivered upon the agreement that the loan shall be made in bank notes of a foreign corporation, of a denomination less than \$5, which the maker is to keep in circulation until the payment of the note, the note is not void if the agreement is not carried out, but the advance actually made upon the note is made in city funds. *Noble v. Cornell*, 98

3. A loan, made by a foreign corporation upon a note, of the whole amount thereof, without deducting or receiving any discount, is not within the provisions of the statute restraining foreign corporations from discounting notes in this state. *Ibid.*

4. In an action upon such a note, evidence, that the foreign corporation to whom it was given was in the habit of discounting notes in this state, is inadmissible. To render such evidence proper, it must first appear that the note in suit was so discounted. *Ibid.*

5. In an action upon such a note against the indorser by the indorsees of the corporation who made the advance upon it, it is no defence that the indorsement was made for a special purpose, and the note has been diverted therefrom, unless it also appear that the original holders were aware of the circumstances prior to making the advance. *Ibid.*

6. In an action against two defendants, as partners, upon a note made in the firm name, the admission by one defendant of the partnership, and of the making of the note, is not sufficient evidence to sustain a judgment against the other. *Rushmore v. Hutchins*, 123

7. In an action by an indorsee against the makers of a promissory note, the plaintiff must prove the indorsement to himself. *Ibid.*

8. An indorsement of a promissory note is a guaranty of the genuineness of the previous signatures, and of the capacity of the parties thereto to contract. *Ogden v. Blydenburgh*, 182

9. Therefore, in an action against the indorser of a promissory note, it is no defense to show that the payee and prior indorser was a married woman. *Ibid.*

10. The capacity of a married woman to indorse paper made payable to her her order, considered. *Ibid.*

11. A direction in a note, making it payable at a given bank, is equivalent to request to the bank to pay it. *Griffin v. Rice*, 184

12. The acceptor of a draft, drawn upon him personally, and accepted by him, with the addition to his name of the words "Treasurer Neuvitas M. Co.", is, *prima facie*, personally liable for the acceptance. Such an addition is only a *scriptio personarum*, and does not absolve him from personal responsibility. *Bruce v. Lord*, 247

13. In an action upon such an acceptance, he may discharge himself by showing that he accepted it as agent, and by authority of such company, and that the plaintiff was aware of the fact at the time of taking the draft. But the proof for this purpose must be of such a nature as would be sufficient to establish the liability of the company in an action against it upon the draft. *Ibid.*

14. Authority to thus accept on behalf of a company cannot be proved by parol. It can be conferred only by a resolution of the board of directors, and the resolution must itself be produced. *Daly, J., dissenting*. *Ibid.*

15. Where a party, without consideration, accepts a draft with a conditional understanding that it is to be used for a special purpose, in its application to which purpose he has some interest, and it is converted to a different purpose, he is not liable upon it, except to an innocent holder, who has taken it before maturity, and given a good consideration for it. But if the acceptor receives a full consideration for his acceptance, he is liable thereon to the holder, and it is immaterial what use was made of the draft by the drawer, or whether the holder has paid value therefor or not. *Moore v. Ward*, 337

16. W. accepted certain drafts of the R. R. V. U. R. R. Co., upon the agreement that they should provide funds to take them up as they matured. The company at the same time pledged with W. bonds to an amount, at their par value, exceeding the drafts, upon the agreement

that W. might sell them without notice, and reimburse himself the amount of his acceptances, if they were not provided for by the company pursuant to their contract, and might use them in the *interim*, provided he would supply their place with similar bonds, upon the company's paying the drafts before maturity. The drafts were to be used upon an uncompleted part of the company's route. *Held*—

I. That the acceptance was not an accommodation acceptance by W., but was one for value.

II. In the absence of any evidence, as to W.'s use of the bonds, or of any loss to him thereon, it was immaterial that the company used the acceptances for a different purpose than that for which they were intended to be used; and it was immaterial whether the holder, an indorsee, paid value for them or not.

III. That evidence of W. being interested in the completion of the railroad was irrelevant and properly excluded.

*Ibid.*

17. In an action upon a promissory note, between the original parties to it, a failure of consideration is a good defence. But proof of such failure is not admissible, in an action against the maker by an indorsee, where there is no evidence impeaching his title.

When a note is transferred after maturity, it is taken subject only to the defences existing against it in the hands of the holder when it matured. Proof of equities, constituting a good defence as between the original parties, is not admissible in an action by one who has received the note after maturity, if his assignor was a *bona fide* holder before maturity, and without notice of existing equities. *Britton v. Hall*, 558

18. In an action upon negotiable paper, which has been lost, the giving of a bond under the statute (2 R. S. 406, § 76), with sufficient sureties, conditioned to indemnify the defendant against all claims by any other persons on account thereof, is an essential pre-requisite to any recovery thereon. *Desmond v. Rice*, 530

19. The plaintiffs, for a commission of two and a half per cent., which was paid to them by the owners of a promissory note, made payable to the maker's own order, and indorsed by him in blank, indorsed the note to enable the holders to get it discounted. It was discounted by

bank, and, having been protested for non-payment, it was paid by the plaintiffs to the bank, and taken up by them. *Held*, that, by paying and taking up the note, the plaintiffs became subrogated to the rights of the bank, and were not subject to equities between the maker and the parties to whom he delivered the note, and consequently that a claim of the maker against such parties was no defence to an action upon the note by the plaintiffs. *Flint v. Schomberg*, 532

20. The indorsement of the note by the plaintiffs for a commission of two and a half *per cent.*, paid to them by the holders, was not a usurious transaction. *Ibid.*

See CHECKS, 1.

EVIDENCE, 23.

JUSTICES' COURT PRACTICE, 24.

PLEADING, 3, 4.

PROTEST, 1.

#### PROTEST.

1. In an action on a promissory note against an indorser, the plaintiff, to prove service of notice of protest, called the clerk of the notary, who produced a copy of the protest, at the foot of which was a memorandum in these words: "Served notices of protest at indorsers' offices;" and testified, in substance, that he had no recollection or knowledge respecting the service of notices of protest, except what was indicated by the memorandum; that he was certain the memorandum was made on the day of the protest, though he had no positive recollection when it was made; that he was confident, from his invariable custom as to serving notices, that the notice was served on the day following the protest, though he did not remember the fact independently of his memorandum, &c., &c. The defendants gave evidence strongly tending to disprove the receipt of notice by them.

*Held*, that, upon the whole case, there was not sufficient proof of service of notice of protest within the time required by law to charge the indorsers. (INGRAHAM, F. J., *dissented*.)

The evidence, that the clerk had no recollection of the service, independent of the memorandum, and that the memorandum was in his handwriting, and made in the usual course of business, and within the time stated by him, was sufficient to entitle the plaintiff to read the memoran-

dam in proof of any fact which it would serve to establish; but, giving it the fullest effect, it failed to show when the notices were served.

The testimony of the clerk as to the time of service was nothing more than the conclusion drawn by him from the memorandum, his custom in serving notice, &c., and was not proof that the service was made within the time required by law. *Taylor v. Stringer*, 377

## PUBLIC OFFICERS.

See NEW YORK CITY, 1

## R

## RAILROADS.

1. The only limitation upon the legislative power and control of the corporation of New York city over the streets within its limits is, that they shall be appropriated to no use or purpose which is not alike free and common to all travellers. This power cannot be surrendered, either in whole or in part, into the hands of any person or persons, without previous legislative sanction. *N. Y. Harlem R. R. Co. v. The Mayor, &c., of N. Y.*, 562

2. It seems that converting the streets to railroad purposes, and permitting rail tracks to be laid upon them, and used by an association or individuals for carrying merchandise or passengers for hire, is devoting them to an exclusive use, and cannot be permitted without the express authority of the legislature. *Ibid.*

3. Although the power to grant this permission must be derived from the legislature, yet the corporation, by exercising it, is not deprived of its control over the streets in all other respects; and it may, in the grant, impose such conditions respecting the manner in which the rail tracks shall be used, and upon which the future use thereof shall depend, as it may think proper. *Ibid.*

See COMMON CARRIER.  
NEGLIGENCE, 5.

VOL. I.

## RECEIPT.

See ARREST, 1.  
BROKERAGE, 1.  
COMPROMISE, 1, 2.

## RECEIVER.

See ASSIGNMENT, 4.  
SUPPLEMENTARY PROCEEDINGS, 5, 6

## RECOUPMENT.

See COUNTER-CLAIM.  
SET-OFF.

## REFERENCE.

1. An order to refer a cause, brought upon an account for goods sold and delivered, is not an appealable order. *Ubedell v. Root*, 173

2. When a party has proceeded, under an order of reference, with the trial of the cause before the referee, he cannot afterwards appeal from the order. *Ibid.*

3. An order of reference is not appealable when made in a case which the court is authorized to refer, and when it rests in the discretion of the court to grant or withhold the reference. *Kennedy v. Shilton*, 546

4. In an action to dissolve a partnership, and procure an accounting between the partners, an averment in the answer, that on a specified day the accounts were settled and adjusted between the partners, and they had not taken any new contracts since, does not raise an issue which makes it improper to send the cause to a referee. Conceding the allegation to be true, as the partnership did not then terminate, the plaintiff is entitled to an accounting from the time specified. *Ibid.*

See EXCEPTIONS, 4.

## RELEASE.

1. The acceptance by a creditor, from his debtor, of a sum less than the entire debt in full payment and discharge, and the giving of a receipt therefor, expressed to be in full, does not operate to discharge

the debtor. He can be discharged only by a release under seal. *Williams v. Carrington*, 515

2. But a mutual agreement by various creditors with each other to receive from a debtor a sum less than their respective claims, or such an agreement by a single creditor with his debtor, upon the faith of which other creditors are induced to make a similar compromise, is binding. The benefit, which each creditor gains by the engagement of the others to forbear, and the consequent securing of a fund for the mutual benefit of all, is a sufficient consideration to sustain such an agreement. *Ibid.*

3. It seems that where the debts lie in simple contract the composition agreement may be by parol. *Ibid.*

See COMPROMISE, 1, 2.



#### RENT.

See LANDLORD AND TENANT.

LEASE.

UNDER-TENANT.

USE AND OCCUPATION.

#### REPLEVIN.

See CHATTELS.

SALE AND DELIVERY OF CHATTELS.

#### RES-ADJUDICATA.

See APPEAL, 20.

INFANT, 1.

NONSUIT, 1.

SUMMARY PROCEEDINGS, 3.

#### RESCISSON.

1. McC. sold and delivered a horse to R., warranting him to be sound. The horse was delivered Saturday, and was to be paid for the Monday following. On that day R. refused to complete the purchase and pay the money, alleging, as the reason, that the horse was lame, and McC. refusing to take him back, R. sent him to a livery stable, from which, after two or three weeks, McC. took him. The horse

was lame while in R.'s possession. *Held*—

I. That McC., by taking back the horse, rescinded the contract, and could not recover damages for R.'s breach thereof.

II. That he was entitled, however, to recover, as damages, from R. the expenses to which he had been put in curing the horse of his lameness, and the keep of the horse at the livery stable.

III. But, there being no proof as to these expenses, the complaint was properly dismissed. *Cook v. Reed*, 511

#### REWARD.

See EVIDENCE, 11.

8

#### SALE AND DELIVERY OF CHATTELS.

1. In an action for goods sold and delivered, it appeared that the goods were delivered to one B. K., upon the agreement that he should sell them as the accredited agent of the plaintiff, and to return to him the goods unsold. The goods, however, were charged by the plaintiff, in his books, to the defendant, S. K. The plaintiff testified that they were sold exclusively upon his credit. The bill was made out in his name, and was presented to and admitted by him, and he agreed to return the unsold goods within a specified time, which agreement was not fulfilled.

*Held*, sufficient to sustain a recovery against him as principal debtor. *Griffin v. Keith*, 58

2. In an action by several plaintiffs, as partners, for goods sold and delivered, the defendant cannot avail himself, on the appeal, of the objection, that they omitted to prove their partnership, if he allowed the omission to pass without objection on the trial. *Whitlock v. Bueno*, 72

3. In an action for goods sold and delivered, the evidence showed that the defendant admitted the correctness of the bill and promised to pay it, but objected to the interest, and said he bought the goods on credit, without specifying the length of credit: *Held*, there being evi-

dence that he had made payments on account before suit brought, that the judgment of the justice, in favor of the plaintiff for the amount and interest, was correct. *Ibid.*

4. *It seems*, where a chattel is delivered upon a bargain for the purchase thereof, and to pay a stipulated price therefor at a future day, and such delivery is upon the express contract that, until the price is paid, the owner parts with, and the person receiving the chattel acquires, no title, the latter takes no interest before payment, which can be sold on execution against him; and, on default in payment, the vendor may recover the property or maintain an action for its value, even from a *bona fide* purchaser at a sheriff's sale, on an execution against the party to whom the chattel was thus delivered. *Piser v. Stearns*, 86

5. In an action to recover the price of goods sold and delivered, the defendant may show that the goods sold were, by the contract, to be delivered in good shipping order, and, upon a breach of that contract on the part of the plaintiff, may recoup damages therefor. *Stewart v. Bock*, 122

6. In the case of a contract for the sale and delivery of goods, it is never to be presumed, in the absence of an express agreement, that payment is to be made until the delivery of the goods purchased.

C. agreed to sell R. a lot of soap and candles, agreeing to take as part payment, in exchange, a lot of damaged candles. R. pointed out the damaged candles to C.'s clerk, and told him to send the soap and take the candles away; but before the soap had been all delivered, or the candles had been taken by C., R. failed and made an assignment.

*Held*, that the title to the candles did not pass to C., but remained in R. until the delivery of the soap was completed, and that, in an action by C. to recover the value of the damaged candles from P., who purchased them from R.'s assignee, the complaint was properly dismissed. *Chapin v. Polter*, 366

7. *Per DALY, J., dissenting*.—Where a part payment of the purchase money is relied upon, to take a parol contract for the sale of goods, out of the statute of frauds, the payment must be made at the time when the contract was entered into;

but a delivery and acceptance of a part of the goods takes the case out of the statute, although it takes place after the parties have agreed to the conditions of the sale.

What evidence of a delivery is sufficient to take a case out of the statute of frauds, considered.

It is a general rule, in the case of a sale of personal property, that if the property remain in the possession of the vendor, and anything remain to be done, such as weighing, measuring, and the like, the title to the goods does not pass. But it is otherwise if it was the intention of the parties that it should pass. Where, in such case, there is any question as to the intention, it should be left to the jury. *Ibid.*

See ADMISSIONS, 3, 4.  
ASSIGNMENT, 4.  
CHATTELS, 1.  
CONTRACT, 9.  
STATUTE OF FRAUDS, 2.  
TENDER, 3.  
WARRANTY, 1.

#### SATISFACTION.

See JUDGMENT.  
RELEASE.

#### SEAMAN'S WAGES.

1. The rule by which seamen lose their wages by the loss of the vessel is one of public policy, founded upon the assumption that such a rule is essential to stimulate them to use every exertion for the safety of the ship, but it applies only in cases where there is a total loss of vessel and cargo. *Worth v. Mumford*, 1

2. Where there is not a total loss, the seaman's contract continues in force as long as anything is essential to be done in the rescue and preservation of whatever can be saved of the vessel or cargo, and, up to the time that the seamen are engaged in the discharge of that duty, they are entitled to wages, if they have faithfully performed their duty. When, however, by capture or perils of the sea, the vessel and cargo are totally lost, their contract is at an end, and the rule of public policy applies. *Ibid.*

3. The right to wages does not grow

out of, or depend upon the earning of freight. It has its foundation in the seaman's contract, and the faithful performance of it on his part, and the maxim, that "freight is the mother of wages," in the view that they depend upon the earning of freight, is erroneous. *Per DALY, J.* *Ibid.*

4. The origin of this maxim, and the erroneous views to which it has given rise, together with the history, the reasons for and nature of the maritime policy by which the interest of the seamen is connected with the safety of the ship, commented upon and discussed. *Per DALY, J.* *Ibid.*

5. A seaman, as long as his contract continues in force, cannot act in the capacity of a salvor, or become entitled to compensation as such, but is bound by his contract to exert himself to the utmost to save and preserve whatever can be rescued from the wreck. *Per DALY, J.* *Ibid.*

6. In addition to the personal liability of the master and owner under the contract, the seaman has, by way of security, a lien upon the vessel as long as a fragment of it remains, and upon the freight, if any is earned before or after the breaking up of the voyage. *Per DALY, J.* *Ibid.*

7. The seamen's right to wages does not depend upon whether sufficient is saved from the wreck to pay them, or upon whether freight enough has been earned or may be earned for that purpose. The seamen's lien upon the vessel and freight is a security collateral to the principal contract, which is not created by the act of shipwreck, but which existed from the beginning, and which is never wholly extinguished as long as a fragment of the vessel remains, or there is a probability of freight being earned upon any part of the cargo saved. *Per DALY, J.* *Ibid.*

8. A vessel bound from Callao to Baltimore, after having encountered severe gales, was brought, by great exertion on the part of the seamen, into the harbor of Pernambuco, by which the cargo was secured in safety, though the vessel had to be abandoned as a wreck.

*Held*, that the seamen were entitled to their wages up to the time when their labor ceased in the landing, securing, and preservation of the cargo. *Ibid.*

9. The cargo having been shipped by another vessel to Baltimore, by which the owners of the abandoned vessel became entitled to freight—*held*, that freight had been earned, if the earning of it was essential to entitle the seamen to their wages, though the cost of transporting the cargo from Pernambuco to the port of delivery amounted to a greater sum than the owners of the wrecked vessel were to receive if the original voyage had been completed. *Ibid.*

10. A receipt by the seaman of his share of the proceeds from the sale of the vessel is not conclusive upon his claim for the balance of his wages, especially where it is signed under a threat from the consul that he should get nothing unless he signed it. Even if the receipt had been in full, it would not, under such circumstances, be conclusive against the seaman. *Ibid.*

11. An entry in the log-book is, by the act of 1790, evidence of desertion, and, if there is no other, it is conclusive; but to make it so the statute must be strictly complied with, and it must appear to have been entered on the day when the seaman left, and from the entry that he left without leave. *Ibid.*

12. Parol evidence is admissible to contradict the entry, and where the entry was shown to have been interpolated after the alleged day of desertion, and there was evidence that the seamen did not leave the vessel, finding of the fact contrary to the log-book was sustained. *Ibid.*

13. An entry in the log-book is not evidence *per se*, unless where the statute makes it so. It cannot, therefore, be received to show a general maritime desertion. *Ibid.*

14. A general maritime desertion may be shown against the claim for wages, though no entry of the fact has been made in the log-book. It is otherwise, however, when the owner relies upon a forfeiture, under the act of 1790, of a day's wages for every hour that the seamen are absent without leave. *Ibid.*

See JUSTICES' COURT PRACTICE, 18.

#### SERVICES.

See ACTION, 6.

BROKERAGE, 1, 2.  
COMMON CARRIER, 13.  
CONTRACT, 1, 2, 3.  
COSTS, 3.  
PRINCIPAL AND AGENT, 2.  
SEAMAN'S WAGES.

## SETTLEMENT.

See COMPROMISE

## SET-OFF.

1. In an action by G. against B. & F., brought after their assignment for the benefit of creditors, evidence of their claim against G. was offered as a set-off, and excluded upon the ground that it had been assigned.

*Held*, that it was properly excluded; and the fact that it had not been set off in such action was no bar to another action on such claim by the assignee. *Ives v. Goddard*, 434

See BANKS, 3.  
EXECUTION, 3.

## SHERIFF.

See EXECUTION.  
MARRIED WOMAN, 2.

## SHIPS AND VESSELS.

1. The statute (2 R. S., p. 92, § 1), regulating the course of steamboats which "meet each other" on any waters within the jurisdiction of this state, does not apply to steamboats whose course is at right angles to each other. In such a case, when a collision occurs, the question of liability therefor depends upon the question of negligence, and is to be determined by the general considerations which govern such questions, not by the statute regulation. *Hunt v. Hoboken L. & I. Co.*, 161

See COMMON CARRIER, 14, 15.  
FREIGHT.

INSURANCE, 1.  
SEAMAN'S WAGES.

## STATUTES.

1. It is an invariable rule of constru-

tion, in respect to the repealing of statutes by implication, that the earliest act remains in force, unless manifestly inconsistent with and repugnant to a subsequent act upon the subject, or unless in the last act express notice is taken of the former one, plainly indicating an intention to abrogate it. *The People v. Deming*, 271

2. A repeal of a statute by implication is not favored; on the contrary, courts are bound to uphold the prior law, if the two acts may well subsist together. *Ibid.*

3. The provisions of the Revised Statutes (2 R. S., p. 449, § 142, 4th ed.), rendering a constable liable in all cases in the amount of the execution, for a neglect to return the process within the required time, do not apply to constables in the city of New York. *Carpenter v. Doody*, 465

See CONSTABLE, 5.  
NEW YORK CITY, 1, 5, 6.

## STATUTE OF FRAUDS.

1. S. went with D. to the store of C., requested him to sell goods to D., and said he would see that C. was paid for them. He at the same time requested C., privately, not to inform D. that he was security, but to try first and get the money from D., and, if D. failed to pay, he, S., would. In an action by C. against S. for goods sold, which were delivered and charged to D., who failed to pay for them —*Held*.

L That the undertaking of S. was collateral, and, not being in writing, was void under the statute of frauds.

II. That the original undertaking being void, the testimony of C., that he sold the goods upon the credit of S., was irrelevant, and was improperly admitted on the trial.

III. That a subsequent promise by S., to pay for the goods, would not render him liable therefor. *Allen v. Scarf*, 209

2. The rule which controls in such cases is, that if the credit is not given wholly to the person who undertakes to be responsible for goods delivered to another, his undertaking is collateral, and must be in writing. *Ibid.*

3. And where the original undertaking is collateral, and void under the statute, it

cannot be made valid by the vendor's showing that he intended to give the credit to the person sought to be charged with the debt, nor by such person's subsequent parol promise to pay. *Ibid.*

4. An agreement to pay the plaintiff a specified sum if he would hire certain premises for a year, to commence on a future day, at a certain rate, and to be occupied for a specified purpose, is not an agreement which cannot be completed within one year, and which must be reduced to writing, under the statute of frauds, to make it obligatory.

Such an agreement is completed on the part of plaintiff when he has hired the premises and assumed the responsibility of paying the rent, pursuant to the request of the defendant. *Gilsey v. Wild*, 305

See **SALE AND DELIVERY OF CHAT-  
TELS**, 1, 6, 7.

#### STATUTE OF LIMITATIONS.

See **LIMITATION OF ACTIONS**.

#### STEAMBOATS.

See **SHIPS AND VESSELS**.

#### STREETS.

1. The only limitation upon the legislative power and control of the corporation of New York city over the streets within its limits is, that they shall be appropriated to no use or purpose which is not alike free and common to all travellers. This power cannot be surrendered either in whole or in part, into the hands of any person or persons, without previous legislative sanction. *N. Y. & Harlem R. R. Co.* v. *The Mayor, &c., of N. Y.*, 562

2. It seems that converting the streets to railroad purposes, and permitting rail tracks to be laid upon them, and used by an association or individuals for carrying merchandise or passengers for hire, is devoting them to an exclusive use, and cannot be permitted without the express authority of the legislature. *Ibid.*

3. Although the power to grant this permission must be derived from the legislature, yet the corporation, by exercise

ing it, is not deprived of its control over the streets in all other respects; and it may, in the grant, impose such conditions respecting the manner in which the rail tracks shall be used, and upon which the future use thereof shall depend, as it may think proper. *Ibid.*

#### SUBMISSION.

See **ARBITRATION**.

#### SUMMARY PROCEEDINGS TO RE- COVER POSSESSION OF DEMISED PREMISES.

1. In summary proceedings to recover possession of demised premises, the evidence showed that defendants entered upon the premises immediately before the expiration of the term of plaintiff's tenant; but the tenant testified positively that she never gave defendants permission to come in, nor sold nor assigned her lease to them; that they came in as she was moving out, claiming that the premises were theirs.

Held, that, upon the evidence, the entry was under a claim of title hostile to plaintiff, and not under his demise; and that there was, therefore, no relation of landlord and tenant between the plaintiff and defendants which could support summary proceedings (*BRADY, J., dissented*). *Carlisle v. McCall*, 399

2. A justice of the district court has jurisdiction of summary proceedings to obtain possession of demised premises within the city and county of New York, although neither of the parties reside, and the premises are not situated within the district for which such justice is elected. *Per BRADY, J.* *Ibid.*

3. On the trial of an issue joined in summary proceedings to recover possession of demised premises, the evidence was closed upon both sides, and the cause submitted, with the single reservation of leave to put in written points, and, after adjournment, the counsel for the landlord applied to the justice to discontinue the proceeding. No decision in the cause was ever rendered by the justice.

Held, that this proceeding was no bar to a subsequent one, although between the same parties and involving the same questions. *Ibid.*

## SUNDAY.

The parties to a controversy submitted to arbitration, their witnesses, and the arbitrators chosen, were all of the Jewish nation. The meeting of the arbitrators for the trial of the cause was held on the 1<sup>st</sup> day, and the award was on that day agreed upon and signed; but it was dated the 2<sup>nd</sup> day, and was not until then delivered to the parties. *Held*, that the award was valid. *Isaacs v. The Beth Hludash Soc'y*, 469

the debtor, to apply future income accruing therefrom to the payment of the judgment.

When in such proceedings the existence of a trust fund is disclosed, the judge should appoint a receiver to bring an action against the debtor and the trustee, to compel the application of any accruing income to the payment of the judgment, and should enjoin the trustee from paying over any of the moneys arising from the fund to the *cestui que trust*, for a time sufficient to enable the receiver to bring such an action.

The necessity of a suit for such purpose has not been dispensed with by the Code. By it, all the rights of the parties can be protected, the amount necessary for the support of the *cestui que trust* can be ascertained, and, by an injunction issued pending the suit, the rights of the judgment creditor can be preserved until a final adjudication can be had. *Stewart v. Foster*, 505

## SUPPLEMENTARY PROCEEDINGS.

1. In supplementary proceedings, the judge at chambers, before whom the order is returned, may vacate it on motion of the summoned party, if the affidavit on which it is founded is insufficient, or if for any reason it appears to have been improvidently granted. *Courtois v. Harrison*, 109

2. It is too late, after judgment against a defendant as treasurer of a joint stock association, and in supplementary proceedings to enforce the payment of the judgment, to raise the objection that they are not such an association within the meaning of the statute. *Ibid.*

3. Nor can this court, in such proceedings, founded upon a judgment of the Marine Court, go behind the record, and take into consideration affidavits, or the judge's certificate, that he ordered judgment against the defendant individually, and that it was entered against him as an officer of such association by mistake. If such an error has been committed, application for relief must be made to the court in which the judgment was rendered. *Ibid.*

4. Proceedings supplementary to execution, under § 294 of the Code, may be taken, to compel the treasurer of a joint stock association to submit to an examination, upon the allegation that he is indebted to it, though the judgment is entered against him as treasurer of such association, and the action was commenced by the service of summons upon him under the act of 1849. *Ibid.*

5. A judge should not, on supplementary proceedings, by a summary order, require trustees, who hold a trust fund of

*It seems* that the provisions of the Code, for proceedings supplementary to execution, are limited to reaching property of the debtor, whether in his possession, or in the possession of others for him, and which is conceded to be his; also money due to the debtor when the order is obtained and served.

But when property or money appears to belong to him, but is in the hands of others who make claim thereto, it should be reached through a receiver. *Ibid.*

## SURETY.

1. It seems, that a surrender by the tenant and an acceptance by the landlord, of the leased premises, will operate as a release to the surety, in respect to all subsequently accruing rent. *Brady v. Peiper*, 61

2. An agreement on the part of a creditor to accept, from the principal debtor, a sum less than the stipulated amount, without any other change in the agreement between them, will not discharge a surety for the debt. *Ellis v. McCormick*, 318

3. The surety of a constable upon his official bond is liable in damages for the constable's neglect to return an execution within the time required by statute.

The condition of such bond; that the

constable "shall in all things well and faithfully perform and execute the duties of the office of constable, without fraud, deceit, or oppression," requires two things—*First*, That he shall perform the duties of his office—*Second*, That he shall do so without fraud, deceit, or oppression. The former is for the benefit of the creditor, the latter for the protection of the debtor. And in an action by the former upon the bond for the official neglect of the constable, *e. g.*, to return an execution within the requisite time, it is not necessary to show fraud, deceit or oppression.

In such an action, a judgment previously recovered against the constable for the same neglect is *prima facie* evidence of the amount for which the surety is liable. *Carpenter v. Doody*, 465

4. S. leased certain premises to N., by whom the lease was assigned to Sch. He assigned the lease, in turn, to W., taking an agreement from him to pay the rent, and from R. an agreement as surety for the punctual payment thereof. *Held*, that the agreements were without consideration and void.

Sch. was liable for rent only so long as he remained assignee of the lease, and was relieved of that liability by his assignment of the lease. W., by his acceptance of the assignment, became liable to S., the original landlord; and his agreement to pay the rent to Sch., his immediate assignor, and R.'s agreement as his surety, were therefore without consideration, and neither he nor the surety was liable to Sch. or his assignee thereon. *Stoppani v. Richard*, 509

See ACTION, 8, 9, 10.

LANDLORD AND TENANT, 9.

LEASE, 1.

PROMISSORY NOTES, 1.

STATUTE OF FRAUDS, 1.

#### SURRENDER.

1. It seems that a surrender by the tenant and an acceptance by the landlord, of the leased premises, will operate as a release to the surety, in respect to all subsequently accruing rent. *Brady v. Peiper*, 61

2. Where a landlord, being informed of his tenant's intention to remove from the demised premises on a certain day, gave him permission to leave some of his prop-

erty on the premises after the day named—*Held*, that giving such permission was evidence from which an acceptance of a surrender of the premises might be presumed; and that no rent could accrue thereafter. *Stanley v. Roehler*, 354

See LEASE, 1.

#### T

#### TENANTS IN COMMON.

1. Where one of two tenants in common gave permission to a third person to occupy a part of the premises, and the other co-tenant expelled him, *held*, that the latter was a trespasser, that the possession was joint, and that neither co-tenant could take the exclusive possession. *McGarrell v. Murphy*, 132

#### TENDER.

1. A vendor under contract to convey real estate, in order to put the vendee at fault, and maintain an action against him for damages for breach of contract, must show a tender of a sufficient deed, and a refusal to accept; although by the terms of the contract the vendor was to convey when the vendee was ready and tendered a compliance with the contract on his part. *Smith v. Smeitzer*, 287

2. A tender, at a time and place designated by the vendee, is sufficient.

But the tender of a deed, executed and acknowledged, is not sufficient if acknowledged in another state, or in a county other than that in which the property is situated, unless accompanied by such a certificate of the authority of the commissioner taking the acknowledgment as will entitle the deed to be recorded. The *onus* of procuring such certificate is on the vendor. *Ibid.*

3. To enable the vendee of a chattel to recover damages for breach of the contract to deliver, he must prove payment or tender of the purchase money, or other performance of the contract, upon his own part.

A mere declaration of a vendor, to a third person, that he would not be able to deliver at the time agreed on, is not

evidence of a breach on his part; but it might have the effect of relieving the vendee from liability for not being prepared to receive at the time appointed. *McDonald v. Williams*, 365

See CONTRACT, 1, 2.

#### TORT.

See CONVERSION.  
MARRIED WOMAN, 3.

#### TRADE-MARK.

1. In an action to restrain the defendants' use of the plaintiffs' trade-mark upon an article intrinsically valuable, it is no defence that the trade-mark in question is a false and fraudulent one, used by the plaintiff with intent to deceive, and that the article which is accompanied by it is not what the trade-mark indicates it to be. *Stewart v. Smithson*, 119

2. In such an action, the trade-marks containing these words, respectively,— one of them, "H. & M.'s patent thread, Barnsley," and the other, "G. & W.'s celebrated patent thread, Berwick"— held, that it was no defence that the threads were not patented, and were not made by the persons whose names they bore, nor by their assignees or successors, nor at the places designated on the trade-marks, but that the trade-marks were false and fraudulent; and a motion to amend the answer, by inserting allegations to that effect, was properly denied. *Ibid.*

#### TRESPASS.

See COUNTER-CLAIM, 6.  
EVICTION, 1, 2.  
EXECUTION, 1.  
TENANTS-IN-COMMON, 1.

#### TROVER.

See CHATTELS.  
CONVERSION.  
SALE AND DELIVERY OF CHATTELS.  
TENDER.

#### TRUSTEES.

See ASSIGNMENT, 1, 2.  
SUPPLEMENTARY PROCEEDINGS,  
5, 6.  
TRUSTS, 1, 2, 3.

#### TRUSTS.

1. A devise to executors in trust, to use the devised fund in the education, support, and maintenance of the testator's three children, or of such of them as may survive, or of the issue of any that may die, until the two youngest, or the survivor, attain the age of thirty years, is valid. The limitation is, in fact, for two lives only, viz., those of the two youngest children. *Gilman v. Reddington*, 492

2. The power to accumulate the fund beyond the minority of the testator's two youngest children, conferred by such a devise, is void; but it does not invalidate the bequest, or the trust estate created thereby. That continues in the trustees until the two youngest children, or the survivor of them, attain the age of thirty. So far as the right to hold and manage the estate is concerned, it is valid. *Ibid.*

3. A judge should not, on supplementary proceedings, by a summary order, require trustees who hold a trust-fund of the debtor, to apply future income accruing therefrom to the payment of the judgment. When in such proceedings the existence of a trust-fund is disclosed, the judge should appoint a receiver to bring an action against the debtor and the trustee, to compel the application of any accruing income to the payment of the judgment, and should enjoin the trustee from paying over any of the moneys arising from the fund to the *cestui que trust*, for a time sufficient to enable the receiver to bring such an action.

The necessity of a suit for such a purpose has not been dispensed with by the Code. By it, all the rights of the parties can be protected, the amount necessary for the support of the *cestui que trust* can be ascertained, and, by an injunction issued pending the suit, the rights of the judgment-creditor can be preserved until a final adjudication can be had. *Stewart v. Foster*, 505

## U

## UNDERTAKING ON APPEAL

See ACTION, 9, 10.

## UNDER-TENANT.

1. O. W. B. hired certain premises, of which the plaintiff's assignor was owner and landlord, and O. R. B. became surety for the rent. O. W. B. having died, O. R. B. took possession of the premises, and sub-let to the defendant. The plaintiff's assignor having assented to this by taking an order of O. R. B. on the defendant for his rent, and having refused to substitute the defendant as his tenant in place of O. R. B.—*held*, that he could not recover for rent of the defendant, the under-tenant, although there was some evidence of an express promise on his part to make a partial payment in settlement, there being no evidence of O. R. B.'s assent to such payment. *Jennings v. Alexander*, 154

2. No action can be maintained by the lessor against an under-tenant upon the lessee's covenant to pay rent. *Ibid.*

3. Nor can an action be maintained for use and occupation, unless there is an agreement for the use of the premises, express or implied, between the plaintiff and defendant. *Ibid.*

See EVICTION, 3.

LEASE, 4 to 8.

SUMMARY PROCEEDINGS, 1.

USE AND OCCUPATION, 4.

## USE AND OCCUPATION.

1. In order to maintain an action for use and occupation, there must be evidence of an actual and continual occupation during the whole period for which the party is allowed to recover. *Seaman v. Ward*, 52

2. The delivery and acceptance of the key of the leased premises is sufficient to establish the fact of occupation, which will be presumed to continue until an interruption thereof is shown. *Ibid.*

3. H., being the lessee of certain prem-

ises under a lease ending May 1st, 1854, and the owner of a new lease commencing on that day, assigned the latter, on the 14th of March, 1854, to C., and gave him possession. In a subsequent action for rent up to the 1st May, 1854—*held*,

I. That parol evidence was admissible to show that C. took possession under H. prior to 1st May, 1854, and that evidence of such occupation, coupled with the declarations of the defendant, were sufficient to sustain an action for use and occupation prior to 1st May.

II. That a complaint for "one quarter's rent of" premises, describing them, and stating the amount claimed, was sufficient to sustain a recovery in such an action.

III. That a covenant by the plaintiff, in the assignment, against back rents, did not estop him from recovering for the use and occupation of the premises by the defendant, prior to the time when the assigned lease was to take effect. *Hubbell v. Clark*, 67

4. A contract between the parties, either express or implied, is essential to maintain the action for use and occupation; and there can be no implied contract between the owner and the occupant, where a lease from the owner to a third party is shown to be outstanding. Unless the occupant is the assignee under that lease, there is neither privity of estate nor of contract to support an action against him by the owner, for rent. *Journey v. Brackley*, 447

See LANDLORD AND TENANT, 7, 8.

LEASE, 5, 6, 7.

UNDER-TENANT, 2, 3.

## USURY.

1. The plaintiffs, for a commission of two and a half per cent., which was paid to them by the owners of a promissory note, made payable to the maker's own order, and indorsed by him in blank, indorsed the note to enable the holders to get it discounted. It was discounted by a bank, and having been protested for non-payment, it was paid by the plaintiffs to the bank, and taken up by them. *Held*, that by paying and taking up the note, the plaintiffs became subrogated to the rights of the bank, and were not subject to equities between the maker and the parties to whom he delivered the note, and consequently that a claim of the mak-

against such parties was no defence to an action upon the note by the plaintiffs.

The indorsement of the note by the plaintiffs for a commission of two and a half *per cent.*, paid to them by the holders, was not a usurious transaction. *Fiat v. Schomberg,* 532

#### VENDOR AND VENDEE.

See INSURANCE, 2.

SALE AND DELIVERY OF CHAT-  
TELS, 4.  
TENDER, 1, 2, 3.

#### VERDICT.

1. When a verdict is taken subject to the opinion of the court, the court will draw, in support of the verdict, every inference from the evidence which a jury would be justified in drawing. *Williams v. Insurance Co. of N. America,* 345

See APPEAL, 14 to 19.

#### VESSELS.

See SEAMAN'S WAGES.  
SHIPS AND VESSELS.

#### W

#### WAGES.

See SEAMAN'S WAGES.  
SERVICES.

#### WARRANTY.

1. A distinct assertion of the quality of a chattel, made by the owner during a negotiation for its sale, which it may be supposed was intended to cause the sale,

and was operative in causing it, is sufficient to constitute a warranty.

Whether the words used amount to a warranty or not, is a question of fact, and the finding of a justice upon the question will not be reviewed by this court, if there is any evidence to support it. So held in an action for breach of warranty of the soundness of oysters, the defendant's declaration being that "he cut holes in the ice and took them out fresh; that they were good, and in good order."

Various cases upon the question, What is sufficient to constitute a warranty? collated. *Blakeman v. Mackay,* 268

2. A defendant cannot avail himself of the defence, that he acted as agent in making the representation or warranty sued upon, unless he disclosed the fact of his agency at the time of the transaction out of which the suit arises. *Ibid.*

3. In a contract of letting, there is no implied warranty that the premises are tenable. *Mayer v. Moller,* 491

4. V. sold a horse to A. for \$130—\$70 in cash, and \$60 in A.'s due bill. He represented the horse to be sound and kind, and agreed that A. might try him, and if the horse did not prove satisfactory he would take him back, and return the money and the due bill. A., after trying the horse, and having full knowledge of the fact that he had a crack in his hoof, told V. that the horse suited him, and he never returned or offered to return him. In an action on the due bill, A. set up, as a defence, a breach of warranty. *Held—*

I. That there was no warranty. If A. was not satisfied with the horse, he should have returned him.

II. The evidence showing that the horse was worth \$130, and no proof given as to his value without the defect, therefore, even assuming that there was a warranty, the defendant had shown no damage, and the plaintiff was entitled to judgment. *Van Allen v. Allen,* 524

See LANDLORD AND TENANT, 13.  
RESCISSON, 1.

#### WIFE.

See HUSBAND AND WIFE.  
MARRIED WOMAN.

## WILLS.

See TRUSTS, 1, 2.

## WITNESS.

1. It is not necessary that a witness should be an expert in banking in order to prove a usage of banks. If he knows the usage he is competent to testify to it, whether he is a banker or employed in a

bank, or is accustomed to deal with banks.  
*Griffin v. Rice,* 124

See PARTIES TO ACTIONS, 1.  
PROTEST, 1.

## WORK, LABOR, AND MATERIALS.

See CONTRACT.  
SERVICES.

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